FINAL

REPORT OF

THE ADVISORY COMMITTEE ON

SUBSTITUTE DECISION MAKING

FOR MENTALLY INCAPABLE

PERSONS

This report has been delivered to the Government of Ontario by a special committee established by it to review the various questions involved in substitute decision-making for mentally incapable persons.

The report has not been adopted by the Government. As part of the Government's consideration of the report, it is released at this time to encourage discussion of the issues among the public and to elicit comments.

Your comments are invited, and should be sent by December 31, 1988, to:

Guardianship and Advocacy Review Committee
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DEDICATED TO THE MEMORY OF

DAVID SOLBERG

TABLE OF CONTENTS

PAGE

Letter of Transmittal (v)
Mandate (vii)
List of Members and Consultants (viii)
Estates Committee: Acknowledgment (ix)
List of Members (x)
Acknowledgments (xi)

Organization of the Report 1
- terminology 2

Executive Summary 5

The Appointment of Substitute Decision Makers (diagram) 8

RECOMMENDATIONS 11

1) A PUBLIC SAFETY NET 11

- A PUBLIC GUARDIAN AND TRUSTEE 11
- EMERGENCY ENTRY 14

2) SUBSTITUTE DECISION MAKING 15

- GENERAL 15
- PROPERTY 15

i) Age for Property Decisions 17

ii) Powers of Attorney 17

iii) Statutory Conservatorship 19

iv) Court Appointment of Conservators 22

v) Powers and Duties of Conservators 23

- THE PERSON 27
i) Age for Personal Decisions 27

ii) Persons Who are Mentally Incapable of Personal Care 27

iii) Powers of Attorney for Personal Care 28

iv) Consent to Medical and Psychiatric Treatment 29

v) Court Appointment of Guardians 32

vi) Duties of Guardians, Attorneys for Personal Care and Medical Substitute Decision Makers 36

vii) Order for Assessment 38

PAGE

VALUES UNDERLYING THIS REPORT 41

REPORT AND RECOMMENDATIONS: 55

I A PUBLIC SAFETY NET 56

- A PUBLIC GUARDIAN AND TRUSTEE 58

  A. An Expanded Public Safety Net 58
  B. Service-Oriented and Active 60
  C. Advisory Committees 64
  D. Medical and Human Service Experts 66
  E. Duty of Confidentiality/Duty to Report 67
  F. Mediation 69
- EMERGENCY ENTRY 69

II SUPPORTIVE SERVICES 73

- ADVOCATES 74

  1) Court Appointment of Conservators and Guardians 75
  2) Termination of Conservatorship or Guardianship 76
  3) Order for Assessment/Enforcement 77
  4) Assessment of Capacity for Statutory Conservatorship and Powers of Attorney for Personal Care 78
  5) Refusal of Substitute Decisions About Treatment 79
  6) Annual Visit 79

- PRINCIPLES OF ADVOCACY 80

III SUBSTITUTE DECISION MAKING 87

- GENERAL 88

  A. Legislation 88
  B. Presumption of Capacity 90
  C. Incapacity Defined 91
  D. Counsel for Persons Who are Alleged Incapable 92
  E. Principle of Interpretation 94

- PROPERTY 95

  i) Age for Property Decisions 95

  ii) Powers of Attorney 96
    A. Continuing Powers 96
    B. Witnessing 97
    C. Duties 99

  iii) Statutory Conservatorship 101
    D. Public Guardian and Trustee as Statutory Conservator 101
    E. Professional Certification 104
    F. Developmental Services Act 105

PAGE

G. Replacing the Public Guardian and Trustee 106
H. Applicant Requirements 108
I. Court Determination of Statutory Conservator 110
J. Termination 111

iv) Court Appointment of Conservators 113
K. Application for Conservatorship 113
L. Standard of Proof 114
M. Application for Appointment of Conservators 115
N. Temporary Conservatorship 117
O. Termination of Conservatorship 119

v) Powers and Duties of Conservators 120
P. Authority of Conservator 120
Q. Contracts and Gifts 121
R. Duties 123
S. Guiding Principles for Expenditures 124
T. Court Direction 126
U. Compensation 127
V. Financial Statement: Passing of Accounts 131

- THE PERSON 134

i) Age for Personal Decisions 134

ii) Persons Who are Mentally Incapable of Personal Care 135

iii) Powers of Attorney for Personal Care 136
A. Creation of Power 136
B. Witnessing 137
C. Assessment of Grantor's Capacity 139

iv) Consent to Medical and Psychiatric Treatment 142
D. Substitute Consent 142
E. Who May Substitute Consent 143
F. Patient's Refusal 145
G. Emergency Treatment 148
H. Authority of Substitute 150

v) Court Appointment of Guardians 152
I. Appointment of a Guardian 152
J. Application for Guardianship 153
K. Preferences 155
L. Full or Partial Guardianship 156
M. Extent and Limitations of Medical/ Psychiatric and Psychological Services 157
N. Temporary Guardianship 165
O. Termination of Guardianship 167

vi) Duties of Guardians, Attorneys for Personal Care and Medical Substitute Decision Makers 168

PAGE

- MISCELLANEOUS 171
  - Order for Assessment 171

IV DRAFT LEGISLATION AND COMMENTARY 175
  - Table of Contents 175

APPENDIX: Loi de 1987 sur la prise de decisions au nom d'autrui 299

LETTER OF TRANSMITTAL

December 1987

The Honourable Elinor Caplan
Minister of Health

- and -

The Honourable John Sweeney
Minister of Community & Social Services

- and -

The Honourable Mavis Wilson
Minister Responsible for the Office
for Senior Citizen's Affairs

- and -

The Honourable Ian G. Scott
Attorney General for Ontario

On behalf of the members of your Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, requested by you in November 1985 to review all aspects of the law governing and related to substitute decision making for persons who are mentally incapacitated, including personal guardianship, and to recommend revision of this law where appropriate, I have now the honour to submit our Report.

Our extensive deliberations have not been merely an intellectual exercise. Throughout the process, we attempted to examine practical needs and propose legally-sound practical responses to those needs with the advice and assistance of knowledgeable persons in government and the community.

Many diverse groups suggested persons to serve on our Committee: four government ministries, doctors, psychologists, hospitals, civil libertarians, social workers, adult protective service workers and consumer groups, including seniors, persons identified as developmentally handicapped and their families, the Alzheimer Society of Metropolitan Toronto, the Canadian Mental Health Association, the Psychiatric Patient Advocate Office, and the numerous member organizations of Advocacy Resource Centre for the Handicapped. The opinions of these groups frequently diverged, but a prevailing spirit of compromise and co-operation enabled us to reach the degree of consensus necessary to produce this Report. It cannot be assumed, however, that any one of these groups supports a particular recommendation.

At the beginning of the Committee's deliberations, it decided that it would not directly address provisions of the Mental Health Act regarding involuntary patients. The Committee does not comment on the major revisions contained in Bill 190, which came into force June 29, 1987.

Essentially, this Report is a compromise package, deliberately balanced to meet the needs of the multiple interests represented. Although Committee members may disagree with specific proposed changes, as a group we believe that this Report offers a substantial improvement in the existing law.

Stephen V. Fram, Q.C., Presider

MANDATE

Stephen Fram, Policy Development Division of the Ministry of the Attorney General is requested to chair a committee to be known as the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons. The Committee is to report to and advise the Minister of Community and Social Services, the Minister of Health and the Attorney General.

A member of the Committee is to present the perspective of the organization that selected him or her for consideration by the Committee. Each member of the Committee is expected, through the Committee, to give the Ministers his or her best advice, based on personal knowledge and experience. Each member is expected to serve voluntarily without remuneration for serving as a member from the ministries or from the organizations that selected him or her.

Each member is to be encouraged during the course of the Committee's deliberations to discuss issues and ideas under consideration with people in the organization that selected the member and with others. The contents of a report of the Committee will not be tabled or released to the media before the Ministers have an opportunity to review the report.

The Committee is requested to review all aspects of the law governing, and related to, substitute decision making for mentally incapacitated persons and to recommend revision of this law where appropriate. In connection with revision of that law as it relates to the property of mentally incapacitated persons, the Committee is requested to treat the Interim Report on the Estates of persons Incapable of Managing Their Property, published in August 1985, as its own interim report, to use as it sees fit in assembling its own final report. In relation to its review of personal guardianship, the Committee is requested to utilize a paper prepared for a joint Ministry of Community and Social Services - Ministry of Health project.

The Committee is also requested to review and make recommendations with respect to voluntary adult protective services as those services relate to the Committee's recommendations for changes to the law governing conservatorship and personal guardianship.

It is expected that the Report of the Committee will contain a draft of an act to provide authority for substitute decisions for mentally incapable persons, prepared by the Office of Legislative Counsel. The representatives of the three Ministries are requested to consult with those responsible within their respective Ministry for financial planning and analysis, so that the financial implications of the Committee's recommendations can be assessed along with the proposed legal changes.

THE ADVISORY COMMITTEE ON SUBSTITUTE DECISION MAKING FOR MENTALLY INCAPABLE PERSONS

Members	Nominated By:
Stephen V. Fram, Q.C., Presider	Ministry of the Attorney General
Doris J. Baker, C.S.W.	Ontario Association of Professional Social Workers
David Baker	Advocacy Resources Centre for the Handicapped
Dr. Barbara Blake	Ministry of Health
Joseph Chetner	Independent
Gianni Corini	Adult Protective Services Association of Ontario
Brian Davidson	Canadian Mental Health Association - Ontario Division
Dr. Patricia DeFeudis	Ontario Psychological Association
Howard Epstein	Canadian Civil Liberties Association
Ross W.S. Flowers	District Court of Ontario
David Giuffrida	Psychiatric Patient Advocate Office
Dr. Stephen A. Kline	Ontario Medical Association
Sharon McClemont	Ministry of Community and Social Services
Willson A. McTavish, Q.C.	The Official Guardian
Debi Mauro	Ministry of Health
Hugh S. Paisley, Q.C.	Public Trustee (Acting)
Alan McLaughlin	Office for Senior Citizens' Affairs
Charles E. Onley, Q.C.	Alzheimer Society for Metropolitan Toronto
Doug Rutherford, Q.C.	The Official Guardian (to July 16, 1987)
Ivy St. Lawrence	Ontario Advisory Council on Senior Citizens
Gilbert Sharpe	Ministry of Health
Carolyn Shushelski	Ontario Hospital Association
Paul Vesa	Canadian Bar Association-Ontario Branch(Civil Liberties Subsection)
Judith A. Wahl	Advocacy Centre for the Elderly
Rodney G. Walsh	Ontario Association for Community Living, formerly the Ontario Association for the Mentally Retarded
Peter J. Wiley	Ministry of Community and Social Services
John Wilson	Ministry of Community and Social Services

Substitute Members/Consultants

Hugh Atwood
Arna Banack
Janice Blackburn
Yale S. Drazin
David Golden
Lynda Hessey
David Kennedy
A.J. McComiskey, Q.C.
Dorothy Singer
Bernard Starkman
Dr. Tyrone Turner

Secretaries to the Committee:

Deborah Sattler - Aug. /87 to
Hugh Tye - Aug. /86 to Aug. /87
Duff Waring - Sep. /85 to Aug. /86

Advisory Committee on the Estates of Mentally Incompetent Persons

In August 1984, the Ministry of the Attorney General constituted its Advisory Committee on the Estates of Mentally Incompetent Persons. The Committee's mandate was to review and reform inadequacies in legislation providing for and governing the management of the property of persons incapable of managing their own property. The work of the Advisory Committee on Estates and in particular its Interim Report published in August 1985 substantially contributed to this report. The Advisory Committee on Substitute Decision Making for Mentally Incapable Persons thanks those individuals and their organizations who took part in the Estate Committee's Report, especially the dedicated members who also served on this Committee.

ADVISORY COMMITTEE ON THE ESTATES OF MENTALLY INCOMPETENT PERSONS

Member	Nominated By:
Joseph Chetner	Independent
Kent McClure, Q.C.	Provincial Secretariat for Justice
Doug Rutherford, Q.C.	Ministry of Community & Social Services
A.J. McComiskey, Q.C.	Public Trustee
Mary Marshall	Canadian Mental Health Association -- Ontario Division
Charles E. Onley, Q.C.	Alzheimer Society for Metropolitan Toronto
Harry Beatty	Ontario Association for Community Living, formerly the Ontario Association for the Mentally Retarded
Gilbert Sharpe	Ministry of Health
Ross W.S. Flowers	Chief Judge of the District Court of Ontario
David Baker	A.R.C.H. (Advocacy Resource Centre for the Handicapped)
Raymond S. Wright	Trust Companies Association of Canada
Paul A. Vesa	Canadian Bar Association - Ontario Branch (Civil Liberties Subsection)
James K. McDonald	A.C.E. (Advocacy Centre for the Elderly)
Ellen Liberman	Ministry of Health
David Solberg	Psychiatric Patient Advocate Office
Stephen Fram, Q.C.	Chair, Ministry of the Attorney General

Consultants:

Rodney Hull, Q.C.
Maurice C. Cullity, Q.C.
David G. Fuller
J.M. Fuke
W.P.G. Allen

Secretary:

Catherine Hunt

Acknowledgments:

The Committee is most grateful to the skillful secretarial assistance of Ms. Isabelle MacWilliam and to the careful and tireless efforts of the word processing staff of the Computer and Telecommunications Services Branch of the Ministry of the Attorney General. In particular, Diana Ashford deserves special mention for her valuable contribution to the production of this Report. Without their skills, this Report could not have been written.

ORGANIZATION OF THE REPORT

To facilitate a comprehensive understanding of the Report's discussion and recommendations key terms are defined below. The Executive Summary follows, including the Committee's recommendations.

Underlying values of the Report are detailed prior to the body of the Report to explain the perspective of the Committee on reform. The consensus on values is somewhat unexpected from a Committee representative of so many diverse and apparently conflicting interests. It was not preplanned. It evolved through discussions that led to the recommendations on draft legislation.

The body of the Report has four parts. Part I, A Public Safety Net, discusses recommendations for legislation to establish a Public Guardian. Part II, Supportive Services, looks at the introduction and expansion of services supportive of intellectual capacity, specifically advocates. The Committee's Statement of Principles presented to the O'Sullivan Advocacy Review is also included. Part III, Substitute Decision Making, examines recommendations for legislation to reform the law governing mental incapacity.

Part IV, Draft Legislation and Commentary, is the main focus of the Report because of the effect the legislation will have on people's lives. As there is often a vast difference between the recommendations of a report and the legislation which purports to implement it, much of this Report's substance is set out by way of commentary on the draft provision. Committee members have also been eager to provide a report in a form that is most usable for those responsible for bringing forward legislation. Many have spent years participating in the work of other committees intended to lead to the revision of mental incapacity legislation, only to see their reports gather dust. It is hoped that the best ideas contained in them are found in this Report.

The commentary is quite extensive. It explores the effects of the proposed legislation on other legislation and also sets out the provisions of existing statute law that would be replaced.

Terminology

A familiarity with the following terms used throughout this Report is essential for a proper understanding of the Committee's recommendations.

-- attorney: a person authorized in a power of attorney to do on behalf and for the benefit of the grantor anything contained in the power, subject to restrictions set out in the power or the legislation; attorneys may be authorized to make property management or personal care decisions.

-- advocates: persons or classes of persons, designated in the regulations, to provide information and advice to those who are alleged to be incapable of choice.

-- conservator: a person lawfully invested with the power and charged with the duty to make property decisions on behalf and for the benefit of an individual who is mentally incapable of managing property, subject to restrictions set out in the legislation or a court

	order; conservators can be court-appointed by application or statutory, meaning the Public Guardian and Trustee or the Public Guardian and Trustee's replacement pursuant to the statutory provisions.
-- developmental handicap:	a condition of mental impairment present or occurring during a person's formative years that is associated with limitations in adaptive behaviour.
-- guardian:	a person lawfully invested by a court with the power and charged with the duty to make some or all personal care decisions on behalf and for the benefit of an individual who is mentally incapable of personal care, subject to statutory restrictions or a court order; powers conferred on a guardian are based on an order for full or partial guardianship.
-- mentally disadvantaged:	used nonscientifically to denote a continuum of diminished capacity which includes mental incapacity as defined in the legislation.
-- treatment:	medical or psychiatric treatment or procedure.

EXECUTIVE SUMMARY

For more than a decade, parents of persons who are identified as developmentally handicapped, groups representing the elderly, social service agencies, public health authorities, physicians, hospitals, self-help groups of persons who have received psychiatric treatment, organizations representing the handicapped, and the Ministries of Health and Community and Social Services have expressed the need for revision of the law governing mental incapacity. In particular, they have requested clear legislation regarding guardianship of the person. Many committees have worked to develop improved legislation.

During the same period, the focus of attention for mental health and social services has shifted away from residential care facilities and segregated services towards the objectives of normalization, community services and community living. As a result, there is a growing awareness of the need to support and provide representation for persons who are identified as mentally disadvantaged living in the community.

In the past few years, major steps have also been taken to provide representation for the psychiatrically disabled in psychiatric facilities. Protection of the rights and interests of other mentally disadvantaged persons in residential care facilities has received some attention.

There are unresolved, critical issues regarding the provision and delivery of services to support and provide representation for persons who are mentally disadvantaged. The shortcomings of the existing law and services have become apparent.

Four statutes deal with one or more aspects of mental incapacity, each addressing particular isolated concerns. The result is a lack of coherence in the rules stipulating when and how persons may have their rights to control their lives or property removed and the powers and duties of those who act as substitute decision makers. The law is difficult not only to understand, but to find, yet thousands of non-lawyers must base their actions on it.

Many Ontarians are demanding the right to control all aspects of their own lives in the event of their becoming mentally incapacitated. Under the Powers of Attorney Act, a capable person can only confer on another the power to deal with property. Personal decisions and specifically medical decisions are major concerns of people frustrated by this restrictive statute.

Existing legislation scarcely recognizes the role in substitute decision making of supportive family members. For most individuals who lose mental capacity, family are the primary substitute deciders. At the same time, there is a need for a public safety net for those who do not have supportive relatives and friends to whom they can turn for personal decisions in the event of their mental incapacity. This need is greatest in cases of abuse, exploitation or neglect of individuals who are mentally incapable. There is no public official who is responsible for applications to court for guardianship in these situations.

The Advisory Committee recommends reforms to meet these needs by developing a principled approach to substitute decision making based on fundamental values.

A major concern of the Committee has been the insufficiency of services to support persons who are identified as mentally disadvantaged to live independently in the community. Committee members and many in the community fear the implementation of guardianship legislation that is not accompanied by the provision of advocacy and other services supportive of mental capacity. Those who, with help, can make their own life choices must not lose their right to do so. The draft legislation proposed by the Committee requires the involvement of an advocate wherever use of the legislation could remove the legal right of an individual to make an important decision for him or herself. The Committee has recommended that the new guardianship provisions not come into force as law until the advocacy services necessary to perform essential functions established by the draft legislation are in place. All members agree that this is a minimum. The Committee hopes that more can be done to provide support for disadvantaged adults through case management and advocacy services.

SUBSTITUTE DECISION MAKERS

	Appointment by the Person (while capable)	As a Result of Professional Assessment	Appointment by the Court
Property Decisions	Continuing Attorney for Property Designated Conservator	Statutory Conservator (1) Statutory Conservator (2)	Conservator Temporary Conservator
Personal Care Decisions	Attorney for Personal Care Designated Guardian		Guardian (Partial or Full) Temporary Guardian
Specific Medical/ Psychiatric Treatment Decisions		Substitute Decisions about Treatment Emergency Treatment	

INDEX TO KEY TERMS

Attorney for Personal Care: appointed under a power of attorney for personal care; effective when validated by the court

Conservator: appointed for a person who is found to be mentally incapable of managing property and in need of the appointment

Continuing Attorney for Property: appointed under a continuing power of attorney which survives the grantor's incapacity

Designated Conservator: designation of a conservator who will be given preference as statutory conservator

Designated Guardian: designation of a guardian who will be given preference as court-appointed guardian

Emergency Treatment: in an emergency, the attending physician may administer treatment without a valid consent to save life, limb or a vital organ

Guardian: appointed for a person who is found to be mentally incapable of personal care and in need of the appointment

Medical/Psychiatric Treatment Decisions: authority to consent or refuse consent to treatment where it is recommended for a person who is without capacity to consent

Personal Care Decisions: authority to make some or all of the person's personal care decisions relating to health care, nutrition, shelter, clothing, hygiene and safety

Property Decisions: authority to make decisions relating to the management of the person's property

Statutory Conservator (1): PGT*, or its replacement, once the patient is certified in a mental health facility as mentally incapable of managing property

Statutory Conservator (2): PGT*, or its replacement, once a non-coercive professional assessment is performed and the person is certified as incapable of managing property

Substitute Decisions about Treatment: persons who may consent or refuse to consent to recommended medical/psychiatric treatment in order of priority, i.e., the person's guardian, the attorney for personal care, the person's family, or any close friend

Temporary Conservator: in an emergency, the court may appoint PGT as conservator for up to 90 days

Temporary Guardian: in an emergency, the court may appoint the PGT as guardian for up to 90 days

* PGT: Public Guardian and Trustee

RECOMMENDATIONS

1) A PUBLIC SAFETY NET:

A Public Guardian and Trustee

1.0 There should be an office of Public Guardian to be a public safety net for persons, without family and friends to act, who are mentally incapable of personal care and as a result will suffer detrimental consequences unless there is someone authorized to make necessary decisions for them. It should have a mandate to: apply to court for guardianship; act as substitute medical decision maker of the last resort; and have supervisory responsibilities over attorneys for personal care and private guardians.

1.1 The new office should be combined with the office of Public Trustee. It should continue to perform the financial and administrative functions now performed by the Public Trustee for persons incapable of managing property and, in addition, functions conferred on the Public Guardian and Trustee by the substitute decisions legislation.

1.2 The office should be organized as two Divisions, the Public Guardian Division and the Public Trustee Division.

1.3 The office of Public Guardian and Trustee should be oriented to providing a more personal service-oriented role than the existing Public Trustee office.

1.4 The office of Public Guardian and Trustee should be organized to respond quickly to serious situations in all areas of the province, particularly where individuals are being abused, neglected or exploited or where individuals who are mentally incapable are in need of a substitute decision about treatment.

1.5 There should be an Advisory Committee on Financial Administration. It should be made up of the Public Guardian and Trustee, one member from the Ministry of the Attorney General, one member from the Ministry of Treasury and Economics, two representatives of the investment community who are not employed by the government, and a representative of the private trust bar.

1.6 There should be an Advisory Committee on Guardianship composed of the Public Guardian and Trustee and persons appointed by the Lieutenant Governor in Council, nominated by:

-- an organization representing persons who are identified as developmentally handicapped;

-- an organization representing those concerned about the protection of civil liberties;

-- an organization representing present or former psychiatric patients;

-- an organization representing the elderly;

-- an organization advocating on behalf of people who are handicapped;

-- an organization representing those suffering from neurological disorders.

1.7 Each of the Committees may make suggestions and recommendations with regard to the policies respecting the management and conduct of the office of Public Guardian and Trustee, as it considers advisable.

1.8 Each Committee should make an annual report to the Attorney General.

1.9 The office of Public Guardian and Trustee should be authorized to retain medical experts to advise it regarding medical and psychiatric treatment and authorized to retain other human service experts to advise the office regarding appropriate non-medical responses, for persons who are mentally incapable for whom it must make decisions under the Act.

1.10 A duty of confidentiality should apply to those connected with the office of Public Guardian and Trustee such that the office shall preserve confidentiality with respect to the personal affairs, or property, of a person for whom the office has a duty to act.

1.11 The Public Guardian and Trustee should be expressly authorized to disclose personal information to third parties where the information is of benefit to the person for whom the office has a duty to act or is necessary for the administration of relevant legislation or where required by law.

1.12 The Public Guardian and Trustee should be required to inform the public on request of the existence of a statutory or court-appointed conservator, an attorney for personal care whose authority is validated, or a guardian; the name of the conservator, attorney for personal care whose authority is validated, or guardian; and the extent of the authority of the conservator, attorney or guardian.

1.13 The Public Guardian and Trustee should be authorized to mediate disputes between private parties that arise under the legislation.

Emergency Entry:

2.0 The Health Protection and Promotion Act, S.O. 1983, c.10, should be amended to authorize a medical officer of health, and those acting under his or her authority, to forcibly enter a private residence to investigate the existence of a medical emergency where:

-- the MOH has reasonable grounds to believe that a person in the residence is at imminent risk of serious physical harm or death, and

-- all efforts, reasonable in the circumstances, have been made to obtain permission to enter, and

-- there has been no response from an occupant of the residence to indicate that entry or assistance is unwelcome, and

-- the least destructive method of gaining entry has been employed by the MOH.

2.1 The MOH should be required to give justification for the forcible entry to the person who is believed to be at risk and to any other occupier of the residence and to the Public Guardian and Trustee.

2.2 A form should be developed for presenting the justification and should provide the names of persons who gave information to the MOH and the information given.

2) SUBSTITUTE DECISION MAKING:

GENERAL

3.0 One Act should govern all forms of substitute decision making for persons who are mentally incapable.

3.1 The Act should deal with:

- powers of attorney for property;
- provisions to authorize and govern the management of property by the office of Public Guardian and Trustee (and family and/or friends in its place);
- court appointment of conservators to manage property;
- powers of attorney for personal care;
- substitute consent to medical and psychiatric treatment;
- court appointment of guardians.

3.2 To reinforce the rights of persons who are mentally disadvantaged to obtain goods and services, the legislation should codify the presumption of capacity to contract or consent. Everyone should rely upon this presumption, unless he or she has reasonable grounds to believe that the person with whom he or she is dealing is mentally incapable of entering into the contract or giving consent.

3.3 Mental incapacity should be defined so that legislation to provide substitute decision making for persons who are incapable cannot be used to interfere with the freedom of action of persons who know what they are doing and appreciate the consequences of their acts, or who can do so with assistance.

3.4 In a legal proceeding in which the mental capacity of a person is an issue, the court should have authority to direct that legal representation be provided for the allegedly incapable person. The office of the Public Guardian and Trustee should be responsible for arranging for representation.

3.5 Whether or not the provision of legal representation is directed by the court, a person alleged to be mentally incapable should be free to choose his or her own legal counsel and to reject counsel proposed by the Public Guardian and Trustee.

3.6 To ensure that legal counsel will be free to act and to preclude prejudging the issue of mental capacity, a person whose mental capacity is an issue should be deemed to have capacity to retain and instruct counsel.

3.7 The Act should provide that any action taken under it, in respect of the person or property of an individual who is mentally incapable, shall be the least restrictive or intrusive of the actions that are authorized and appropriate in the situation.

PROPERTY

i) Age for Property Decisions:

4.0 Under the legislation, the age of eighteen should be the minimum age at which:

- -- an individual may appoint an attorney for property or have a statutory or court-appointed conservator appointed under the legislation;

- -- an individual may act as an attorney for property or as a conservator.

ii) Powers of Attorney:

4.1 Adults should continue to be able, as they can under the Powers of Attorney Act by making a continuing power of attorney, to grant to another, their attorney, the right to manage their property after they have become mentally incapable.

4.2 More stringent witnessing requirements should apply to the creation of a continuing power of attorney and to its revocation, so that there is greater assurance that the grantor of a continuing power is mentally capable when the power is given or withdrawn. The continuing power of attorney is an important document and to ensure that there is certainty about its status, the rules for revocation should be as clear as those for its creation.

4.3 The attorney and the attorney's spouse should continue to be ineligible to be witnesses to a continuing power or to its revocation. The grantor's family, the attorney's family, the staff of a facility at which the grantor receives board or other personal care, and anyone engaged in litigation against the grantor should be ineligible to witness a continuing power.

4.4 The number of witnesses to the creation or revocation of a continuing power should be increased from one to two.

4.5 Witnesses to a continuing power of attorney or its revocation should be required to certify, in writing, that they are of the opinion that the grantor was mentally capable of managing property when the grantor signed the document.

4.6 Attorneys acting under continuing powers of attorney should be subject to certain statutory duties:

-- to act with honesty and integrity, in good faith and for the benefit of the person who is incapable;

-- when not receiving remuneration for managing, to exercise care, diligence and skill in the management of the property according to an objective standard of an ordinary prudent person in business;

-- when receiving remuneration for managing, to exercise care, diligence and skill in the management of the property according to an objective standard of a person in the profession or business of managing estates;

-- to pass accounts when required to do so by the court.

4.7 An attorney acting under a continuing power should be liable to the estate for damages arising from a breach of duty, but the court should be authorized to relieve the attorney from liability, in whole or in part, where the court is satisfied the attorney acted honestly, reasonably and diligently.

iii) Statutory Conservatorship:

5.0 The Public Guardian and Trustee should continue to have the obligation of assuming the management of a mentally incapable psychiatric in-patient's property, but the law governing the Public Guardian and Trustee as manager should be removed from the Mental Health Act.

5.1 When a person becomes an in-patient of a psychiatric facility, there should continue to be an examination under the Mental Health Act to determine if the person is capable of managing property.

5.2 Where the attending physician determines that the person is not capable of managing property, the physician should continue to be under a duty to certify the finding and inform the Public Guardian and Trustee.

5.3 A procedure should be established whereby the property of a person can be managed by the Public Guardian and Trustee until the person objects to the management. The statutory conservatorship should arise when the person permits a professional assessment which results in a finding that the person is mentally incapable of managing property, and the person does not refuse the conservatorship. The person should be advised by an advocate that he or she has the right to refuse the conservatorship.

5.4 The provisions in the Developmental Services Act, similar to those in the Mental Health Act, that provide for medical certification of an individual as mentally incompetent to manage property should be repealed as unnecessary. The existing process is not justifiable in light of Recommendation 5.3.

5.5 The law, as set out in the substitute decisions legislation, should give an attorney under a continuing power of attorney, a conservator designated by the person when capable, family, or friends of the person the right to assume management of the person's property, if they are able and willing to do so.

5.6 The attorney under a continuing power of attorney, or a person designated to be statutory conservator, should be able to replace the Public Guardian and Trustee as statutory conservator where the attorney or person chosen to be conservator proves the existence of the power, undertakes to act, and submits a plan of management.

5.7 Other persons applying to replace the Public Guardian and Trustee as statutory conservator should be required to establish their suitability to manage property, develop a plan of management for the property and obtain a surety bond to guarantee proper management (or apply to the District Court to reduce or eliminate the bond).

5.8 If an application to assume the function of statutory conservator is refused by the Public Guardian and Trustee and the applicant does not withdraw the application, the Public Guardian and Trustee should be obliged to apply to the court to have the court determine whether the applicant or the Public Guardian and Trustee should administer the property.

5.9 The court should have power to limit the powers of a statutory conservator.

5.10 The statutory conservatorship created following medical certification under the Mental Health Act should terminate:

-- where a physician cancels the certificate of incapacity;

-- where the review board under the Mental Health Act or the District Court on appeal determines that the patient is no longer incapable of managing;

-- when a patient is discharged from a psychiatric facility, unless a notice of continuance is issued by the physician examining the patient at the time of discharge;

-- six months after the discharge where a notice of continuance has been issued.

5.11 The statutory conservatorship created pursuant to Recommendation 5.3 (professional certification) should terminate when the Public Guardian and Trustee, or other statutory conservator, receives from the person under conservatorship a direction to terminate and a written statement of an advocate certifying that the advocate has visited the person under conservatorship. It should also terminate when the conservator gives notice to terminate to the person under conservatorship and to the Public Guardian and Trustee.

iv) Court Appointment of Conservators:

6.0 The Mental Incompetency Act should be repealed. Transitional provisions are required to provide for the continued authority of committees appointed under it.

6.1 The new legislation should provide for court appointment of a conservator to manage property for a person who is incapable, where the person's incapacities result in the person being unable to make necessary decisions relating to property and in need of an authorized person to make those decisions for him or her.

6.2 Mental incapacity to manage property and the resulting need for a conservator should be proven beyond reasonable doubt.

6.3 There should be a procedure for summary disposition of an application to appoint a conservator. Where there is proof of incapacity to manage property, and no objection to the appointment of the conservator, the court should be able to make an order without the appearance of parties or counsel being required. Contested applications would be determined at a hearing with full representation or, when ordered, at trial.

6.4 There should be a requirement that the Public Guardian and Trustee apply to the court for temporary conservatorship for a person apparently incapable of managing, where there is a property transaction requiring immediate attention or where conservatorship is needed to provide necessities to the person or to his or her dependants. On application, incapacity to manage property would be proven on the balance of probabilities. The application would require notice to the person who is allegedly incapable but the court should be empowered to dispense with notice in case of an emergency. The temporary conservatorship should be limited to ninety days.

6.5 There should be a summary disposition procedure for terminating a conservatorship by application, similar to the procedure to establish conservatorship.

v) Powers and Duties of Conservators:

7.0 Unless specifically limited by order of the court, a conservator, whether statutory or court-appointed, should be authorized to do anything in the management of property that the person who is incapable could do, if capable, except to make a will. It should no longer be necessary to bring applications to the court to approve specific transactions.

7.1 The court should be able to limit the powers of a conservator, on application, at any time during the conservatorship.

7.2 In an action by a conservator to void a contract or gift entered into or made by a person under conservatorship, or within six months prior to the creation of the conservatorship, the onus should be on the defendant to prove that the defendant did not have reasonable grounds to believe that the person under conservatorship was incapable.

7.3 Conservators' duties should include:

- the duty to act with honesty, integrity, in good faith and for the benefit of the person who is incapable;
- the duty to exercise in the management of property, at least the degree of care, diligence and skill of an ordinary, prudent person in business in the conduct of the business;
- when acting for a fee or other remuneration, the duty to exercise in the management of property, the degree of care, diligence and skill that persons in the profession or business of managing estates would exercise in that profession or business; and
- the duty to act in accordance with the plan of management established for the estate.

7.4 In the allocation of income and assets of the estate, a conservator should be under the following duties:

-- to satisfy the legal obligations of the person who is incapable;

-- to provide what is reasonably necessary for the support, education and care of the person who is incapable and his or her dependents, taking into account their accustomed standard of living;

-- where resources are ample to continue to discharge the above primary duties:

  . to give assistance to friends and family;

  . to make charitable gifts, not exceeding 20% of the annual income of the property, unless varied by the court on application;

as there is reason to believe would have been made if the person who is incapable was capable.

7.5 A conservator should be liable for damages resulting from a breach of his or her duties, but the court should be authorized to relieve the conservator from personal liability, in whole or in part, where it is satisfied that the conservator has acted honestly, reasonably and diligently.

7.6 A person who is incapable or a conservator, an attorney acting under a continuing power of attorney, an attorney for personal care, a guardian, if any, a dependant of a person who is incapable, or any other person with leave of the court, should be able to apply to the court to have directions given to the conservator or attorney on the administration of property.

7.7 There should be a statutory entitlement to compensation in favour of the conservator.

7.8 A simplified fee scale should be established by regulation, setting out as a normal fee a percentage charge on revenue and a percentage charge on capital value.

7.9 Discretion should be given to the court to adjust the compensation claimed by both the Public Guardian and Trustee and private sector conservators on the basis of the amount deserved.

7.10 The conservator should be able to take his normal fees in monthly instalments or quarterly instalments.

7.11 A conservator should have a duty to prepare an annual financial statement showing:

-- the assets at the beginning of the year;
-- the assets at the end of the year;
-- capital receipts and disbursements;
-- revenue receipts and disbursements; and
-- compensation claimed.

7.12 Where the conservator is the Public Guardian and Trustee, notice of the availability on request of the financial statement should be given to the person who is incapable, his or her guardian or attorney for personal care, if any, and to the persons entitled to replace the Public Guardian and Trustee as statutory conservator.

7.13 Where there is a private conservator, notice of the availability on request of the financial statement should be given to the person who is incapable and to the guardian, or attorney for personal care, if any, of the person who is incapable, and to the Public Guardian and Trustee.

7.14 Conservators should be required to pass their accounts on order of the court.

THE PERSON

i) Age for Personal Decisions:

8.0 Under the legislation, the age of sixteen should be the minimum age at which:

-- an individual may appoint a personal attorney, or have a medical substitute decider or a guardian appointed under the legislation;

-- an individual may be appointed as personal substitute decider or be appointed by the court as guardian for another.

ii) Persons Who are Mentally Incapable of Personal Care:

9.0 A person is incapable of choice with respect to the necessities of life, and therefore, incapable of personal care, where the individual is unable to understand information that is relevant to making a decision about:

-- health care;
-- nutrition;
-- shelter;
-- clothing;
-- personal hygiene;
-- personal safety; or

is unable to appreciate the consequences of the decision, or lack of decision.

iii) Powers of Attorney for Personal Care:

10.0 Persons should have the right when mentally capable, by making a power of attorney for personal care, to grant to another, an attorney for personal care, the right to make for them those types of care decisions that they have set out in the power, if they become mentally incapable of making the decisions themselves.

10.1 The creation or revocation of a power of attorney for personal care, like the creation or revocation of a power of attorney for property, should require witnessing by two persons who are not the attorney, the attorney's family, the family of the grantor, an employee of a facility at which the grantor receives board or other personal care, or involved in litigation against the grantor.

10.2 To complete the witnessing requirements for creation or revocation of a power of attorney for personal care, the witnesses should be required to certify, in writing, that they are of the opinion that the grantor was mentally capable of personal care when the grantor signed the document.

10.3 A power of attorney for personal care should authorize the attorney to make personal care decisions after the grantor of the power is independently assessed as mentally incapable of personal care and the appropriate documentation has been filed with the Public Guardian and Trustee.

10.4 The power of attorney for personal care should come into force where:

-- the attorney for personal care has filed with the Public Guardian and Trustee a copy of the power, the assessment of the mental incapacities for personal care of the grantor certified by at least two assessors designated by the grantor or otherwise by authorized professionals, a plan of guardianship and proof that a copy of the assessment has been explained to the grantor by an advocate experienced in working with persons of diminished mental capacity;

-- the Public Guardian and Trustee has not received from the grantor an objection to the activation of the power;

-- the Public Guardian and Trustee issues notice of the activation of the power.

iv) Consent to Medical and Psychiatric Treatment:

11.0 Sections 50 and 51 of O. Reg. 865 under the Public Hospitals Act should be repealed. The provisions of the Mental Health Act regarding substitute consent for voluntary patients should be reconsidered in light of the following system of substitute consent to medical and psychiatric treatment.

11.1 Where a person is apparently mentally incapable of consenting or refusing consent to therapeutic medical or psychiatric treatment, the law should authorize certain others to make the decision on his or her behalf provided that the patient is not refusing the decision.

11.2 The highest priority to make a substitute decision for the patient should be a court-appointed guardian or an attorney for personal care designated by the patient, when capable, by a power of attorney for personal care.

11.3 The second priority should be such members of the family of the patient who have maintained friendly personal contact with him or her in the following order:

-- a spouse;
-- a child;
-- a parent;
-- a brother or sister;
-- other next of kin;
-- a friend.

11.4 Where there is no guardian, attorney for personal care, next of kin or friend willing and able to make a decision, the Public Guardian and Trustee should have authority to decide on behalf of the patient.

11.5 In a non-emergency situation, where the attending physician's opinion is that a patient is without capacity to consent, the patient should be visited by an advocate. The advocate should explain that the attending physician has found the patient without capacity to consent, that someone has claimed authority to give or refuse consent, the decision made by the person claiming authority and the patient's rights to refuse the decision.

11.6 Where the patient refuses to accept the decision made by his or her family or the Public Guardian and Trustee, a second independent medical assessment of the patient's mental capacity to consent should be made. If the assessment shows that the patient is mentally capable, his or her own medical decision must be respected. Where the second assessment is that the patient is incapable, but the patient still refuses to accept a decision, the Public Guardian and Trustee should be notified to permit the office to apply to the court for the appointment of a guardian.

11.7 The existing law with respect to emergencies should be retained. In an emergency, where the delay that would result from seeking consent or substitute consent would endanger the life, limb or vital organ of a patient who is apparently incapable of consenting or refusing consent, the attending physician should be authorized to provide treatment without consent to avert the crisis.

11.8 An attending physician who proceeds under these circumstances should make a written statement indicating that, in his or her opinion, delay in the treatment caused by obtaining consent would endanger the life, a limb or a vital organ of the patient.

11.9 In an emergency, where a patient refuses the proposed treatment, the attending physician should use all efforts that are reasonable in the circumstances to obtain the independent written opinion of a psychiatrist or another physician. Where an opinion is obtained, treatment should not proceed unless the opinion is that the patient is without capacity to consent. Where an opinion is not obtained, the attending physician should make a written statement describing the efforts that were made and why an opinion was not obtained.

11.10 The statutory substitute consent provisions should only apply to medical and psychiatric treatment, the intended effect of which is therapeutic, and for which a physician has responsibility.

11.11 The statutory substitute consent provisions to medical and psychiatric treatment should not apply to psychosurgery as defined in section 35 of the Mental Health Act, non-therapeutic sterilization, or a non-therapeutic experimental treatment or procedure.

11.12 A person making a substitute decision should be entitled to receive all the medical information about the patient and the treatment options to which the patient would be entitled in deciding for him or herself.

v) Court Appointment of Guardians:

12.0 The court should be authorized to appoint a guardian for a person when satisfied beyond reasonable doubt that the person is mentally incapable of personal care and, as a result of the incapacity, he or she requires another who is authorized to make personal care decisions on his or her behalf.

12.1 There should be a procedure for summary disposition of an application to appoint a guardian. Where there is proof of incapacity for personal care and the resulting need for a guardian, and no objection to the appointment of the guardian, the court should be able to make an order without the appearance of parties or counsel being required. Contested applications and those not accompanied by professional mental assessments should be determined at a hearing with full representation or, when ordered, at trial.

12.2 Where an application for guardianship has not been accepted by all parties, the court should give special consideration to the wishes of the person who is incapable and the closeness of the relationship of the proposed guardian to the person.

12.3 There should be an appointment of a full guardian where the court finds the person incapable with respect to all personal care functions, i.e., health care, nutrition, shelter, clothing, personal hygiene and personal safety.

12.4 A full guardian should be empowered to make custodial, most medical, psychiatric and psychological treatment decisions, other health care, social, educational and ordinary decisions that arise on a day-to-day basis.

12.5 A partial guardian would have only the limited authority conferred by the court to make substitute decisions with respect to the personal care decisions that the individual was found to be mentally incapable of making.

12.6 The authority given a guardian to consent or refuse consent to medical and psychiatric services should apply to medical and psychiatric treatment for which a physician has responsibility and psychological treatment for which a psychologist has responsibility, provided that the intended effect of a treatment is therapeutic.

12.7 The authority of a guardian to consent or refuse consent to medical/psychiatric and psychological services should not apply to:

- confinement as aversive conditioning;
- restraint as aversive conditioning;
- electric shock as aversive conditioning;
- any medical/psychiatric or psychological service where the intended effect is not therapeutic

unless the court confers specific authorization regarding these treatments or procedures.

12.8 The court should not be able to give a guardian authority to consent to non-therapeutic sterilization or psychosurgery as defined by the Mental Health Act.

12.9 A guardian should not be able to authorize restraint or confinement unless the court has specifically conferred authority to do so. In particular, a guardian, without specifically conferred authority, should not be able to consent to a person's admission to a psychiatric facility as defined in the Mental Health Act.

12.10 The authority to restrain or confine, if conferred on a guardian, should be exercised only to prevent bodily harm to the person or to another.

12.11 The common law duty requiring care givers to restrain or confine persons in an emergency to prevent serious bodily harm to them or to another person should be codified in the legislation.

12.12 A guardian should not have authority to consent to a person's involvement in a scientific research project or experiment that is not for the therapeutic benefit of the person unless the court confers authorization to consent to a specific scientific research project or experiment. No involvement should be authorized unless the scientific research project or experiment is conducted by personnel in a university or hospital whose research ethics committee has approved the research or experiment; the experimental procedure will not affect the human dignity of the individual; and the risks involved, if any, will be outweighed by the benefit to the person.

12.13 The topic of research projects and experimentation on human subjects should be studied by the government, with a view to enacting general legislation.

12.14 There should be provision for the Public Guardian and Trustee to apply to the court for temporary guardianship of a person apparently incapable of personal care where prompt action is necessary in respect of any matter seriously affecting the person. The court, on application, should be satisfied on the balance of probabilities of the incapacity and should grant only those powers necessary to prevent harm to the individual. The application should ordinarily require notice to the person who is allegedly incapable, but the court should have authority to dispense with notice in an emergency. The temporary guardianship should be limited to 7 days when brought without notice and 90 days with notice to the person.

12.15 Where it is satisfied that there is need to do so to protect the person under temporary guardianship, the court should have authority to confer on the Public Guardian and Trustee, as temporary guardian, power to enter on to property to take the person into custody, using force if necessary, and to call upon a police officer for assistance.

12.16 There should be a procedure for summary disposition of an application for termination of guardianship without requiring the appearance of parties.

vi) Duties of Guardians, Attorneys for Personal Care and Medical Substitute Decision Makers:

13.0 Guardians, attorneys for personal care and medical substitute decision makers should be under duties:

-- to exercise powers diligently, in good faith and for the benefit of the person who is incapable;

-- to make decisions that there is reason to believe would be made by the person who is incapable, if capable, based on the intentions expressed when capable and the present wishes, and where this is not possible, to make decisions that promote the well-being of the person who is incapable;

-- to encourage the person who is incapable to participate in decisions to the best of his or her abilities.

13.1 Guardians and attorneys for personal care should be under a duty to foster self-reliance and independence.

13.2 Each person having a guardian or attorney for personal care authorized to act under a power of attorney for personal care should receive an annual visit by an advocate to ensure that the guardian or attorney is aware of programs to assist the person who is incapable and to determine whether the person wishes to assert any of his or her rights under the Act.

13.3 A guardian or attorney for personal care authorized to act under a power of attorney for personal care should be required each year to report to the Public Guardian and Trustee:

-- the location of the person who is incapable;

-- decisions made on behalf of the person who is incapable to which he or she objected;

-- health care and safety decisions made on behalf of the person who is incapable;

-- any proposals for changes in the guardianship plan;

-- whether an advocate has visited the person who is incapable.

13.4 No proceeding for damages should be commenced against a guardian, attorney for personal care, or a person authorized to make a substitute medical or psychiatric treatment decisions for anything done or omitted in good faith in connection with his or her powers and duties under the legislation.

vii) Order for Assessment:

14.0 Where there are reasonable grounds to believe that a person is mentally incapable, the court should be empowered to order professional assessments of the capacity of a person who is the subject of an application to appoint a conservator or guardian, a temporary conservator or guardian or to terminate a conservatorship or guardianship.

14.1 Preference should be given to conducting the examination in the person's place of residence.

14.2 The examination order should be authority for the place of examination to admit the person and facilitate the assessment, and for the person conducting the assessment to examine the person.

14.3 Where the court has ordered an assessment of a person, and it is established that:

-- the person alleged to be incapable failed, or refused to comply with, the order for examination;

-- access to the person who is allegedly incapable for conducting the assessment has been denied;

-- all methods of gaining voluntary access, reasonable in the circumstances, have been tried; and

-- no less intrusive method of gaining access is feasible

the court should be able to authorize the Public Guardian and Trustee, together with a peace officer, using force if necessary

-- to gain access for the purpose of the assessment;

-- to enter onto the premises;

-- to detain, remove and transport the person alleged to be incapable, if necessary, to a hospital or other place of safety for the purpose of performing the assessment.

VALUES UNDERLYING THIS REPORT

The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms, as a constitutional document, is part of the fundamental law of Canada. As a result, consideration of the values given expression in the Charter must inform any review of the law relating to substitute decision making.

Three provisions were of particular relevance to the work of the Committee:

S.1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law, as can be demonstrably justified in a free and democratic society.

S.7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.

S.15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2). Subsection (1) does not preclude any law,

> program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

Although the nature and extent of the rights protected in section 7 are far from clear, the section does set out a positive entitlement to certain rights, that is, the rights to "life, liberty and security of the person", which may only be impaired by the state "in accordance with the principles of fundamental justice". The Committee has followed the same approach in examining the issue of substitute decision making.

Substitute decision making can be viewed either as a positive good, allowing people through substitutes, to exercise rights they otherwise would be incapable of exercising or, as a necessary evil, grudgingly required to prevent harm to mentally incapable individuals who cannot protect themselves. This Committee has adopted the latter view. The first view has emotional appeal, but at its core it is paternalistic. It assumes that someone other than the individual knows better how that individual should live. The first view will lead to greater use of guardianship. The history of our choices made on behalf of physically or mentally handicapped people demonstrates the effects of paternalism. The first two values underlying this Report, namely no unnecessary intervention and self- determination, are aimed at assuring that this history is neither continued nor repeated.

Section 15(1) of the Charter sets out the equality rights which are guaranteed to all persons, including those suffering from a mental or physical disability.

Section 15(2) provides that the equality rights set out in s.15(1) are not to be interpreted so as to preclude affirmative action programs for disadvantaged individuals and groups.

The parameters of the equality rights sets out in s.15 have not yet been fully defined by the courts. However, the section clearly affirms a commitment to protection from discrimination and segregation. It promotes a society of equal worth and respect for all individuals. It demands tolerance and invites mutual respect. As such, s.15 announces a society that can be a rich amalgam of abilities, colours and cultures.

The values underlying s.15 direct us to consider how the equality rights of individuals and groups may be best promoted. In the case of mentally disadvantaged individuals, it is essential that we assist those who are able to do so to be part of the general community, recognizing that they may have different needs and abilities. This reflects the Committee's third vlaue -- that mentally disadvantaged persons, needing and wanting help to be part of the community, have access to assistance now unavailable to many of the mentally disadvantaged, in support for their personal self-determination and assistance in remaining part of the general community.

A consideration of the fundamental rights and freedoms reflected in the Charter of Rights formed the focus for the development of the Committee's values. Not everyone will agree with the choices of values made by the Committee or on how those values are manifest in the Committee's recommendations and draft legislation. Honesty and courage require that the Committee's values be made as explicit as possible.

1. Freedom from Unnecessary Intervention: The Freedom to be Left Alone

The traditional democratic concept of liberty involves letting people live as they choose or wish, without interference, so long as they do not break the law or endanger others. The Committee believes that intervention is justified when people are mentally incapable of making a choice and, as a result, are suffering, or at risk of suffering, serious harm.

Mental incapacity is an impairment of the intellect that prevents an individual from understanding the available information on which to make a choice or prevents a person from appreciating both the good and the bad consequences of a choice. Our law, including our criminal law, does not hold a person responsible for acts done when mentally incapable.

Mental incapacity must be distinguished from what is called "mental disorder or illness". Most persons who have a mental disorder are capable of intellectually understanding their choices. Most people who are mentally incapable do not have a mental disorder. At the beginning of the Committee's deliberations it decided that it would not directly address treatment decisions relating to involuntary patients under the Mental Health Act. The Committee does not comment on the major revisions contained in Bill 190, which came into force June 29, 1987. However, the government should consider the interface between this Report and the provisions of the Mental Health Act.

It is the intention of the Committee to avoid unnecessary restrictions on liberty. The person who knows what he or she is doing, and understands the consequences, would not be prevented by legislation based on this Report from giving away his or her property. He or she would still have power to refuse all medical treatment and social assistance offered.

The priority given by the Committee to freedom from unnecessary intervention is manifest in the substantive provisions and procedural restrictions of the Report, with respect to when one person may be empowered to make a decision for another.

Its priority is based on of the principle of the least restrictive alternative, which is the principle of interpretation of the draft legislation, intended to guide the courts and substitute deciders on the exercise of their powers.

The priority given to freedom from intervention will likely upset some well-intentioned individuals who sincerely wish to help persons who are living unconventionally - whether or not they are willing to accept help. The Committee's fears for relaxing the law can best be summarized by a warning given in an essay by Trilling :

> "...We must beware of the dangers which lie in our most generous wishes. Some paradox of our nature leads us, when once we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion."
>
> Lionel Trilling, The Liberal Imagination
> (New York: Doubleday, Anchor, 1953) p. 215

The Committee is aware that the exercise of liberty will result in some people choosing to live in situations most of us would consider intolerable.

The Committee shares with other caring people the view that help should be made available to those in deplorable situations who are mentally capable and will accept assistance. The Committee proposes legislation designed to mitigate harm, whether by neglect or by abuse, and to improve the circumstances of those who are not mentally capable. The Committee is opposed to any legislation that would authorize involuntary intervention into the lives of those who are mentally capable.

This opposition to involuntary intervention in the lives of those who are mentally capable is based on principle. Moreover, it seems that involuntary intervention may be practically counterproductive.

The only attempt with which the Committee is familiar to study objectively the effects of intervention to provide intensive health and residential services of a custodial nature to persons who are reluctant to receive them, indicates that the services may actually accelerate decline. [Margaret Blenkner, Final Report: Protective Services for Older People (Cleveland: The Benjamin Rose Institute, 1974)] The same study demonstrates that intervention relieved stress of family and neighbours and met the approval of community agents. It would seem that involuntary intervention, in effect, removes from public view individuals who trouble the public conscience.

2. Self-determination

The positive corollary of the freedom from unnecessary intervention is the freedom to choose for oneself. Some would argue that it should be placed first. Our law is founded on the assumption that a person is free to act, unless that action is specifically and clearly restricted by law. Self-determination is placed second, because the major threat to it, unnecessary intervention, is placed first.

The recommendations in this Report, if implemented, would permit capable persons to determine for themselves who shall make personal decisions for them if they become mentally incapable, and to express their intentions on what should be considered in arriving at a decision. At present, there are legal impediments to doing this.

The law, historically, prevented persons from creating powers of attorney that continued after their mental incapacity. A power of attorney is a written authority given by one person, the grantor, to another, the attorney, that gives the attorney the legal power or capacity to do what the giver could do. A power of attorney is a form of agency. A power of attorney with respect to property can be limited, for example, to pay taxes and other bills, or it can be general, to perform all the property transactions that the grantor could perform him or herself.

Until 1979, a person was legally unable to create a power of attorney that would permit an attorney to act when the giver of the power, the grantor, lost the mental capacity to act. Simply put, when the grantor became mentally incapable of managing his or her property, the attorney could not legally continue to act.

Amendments to the Powers of Attorney Act in 1979, 1983 and 1986, made in response to the demand from the community, now permit the grantor's attorney to act after the grantor of the power becomes mentally incapable of managing his or her own property, if the grantor so provides. In this Report, that form of power of attorney over property is called a continuing power. The Committee recommends its retention.

Powers of attorney with respect to personal decisions have never existed. There would have been no purpose to those documents, since they would not have continued after the mental incapacity of the donor. The Committee recommends changing the law to permit persons, when capable, to appoint personal attorneys with powers to make personal decisions on their behalf, in the event that they become mentally incapable. Like powers of attorney over property, a capable person would be allowed to decide the extent of the powers conferred on the attorney.

Safeguards are recommended to assure that these powers of attorney for personal care are not used to deprive a person who is mentally capable of the right to decide for him or herself. Before an attorney could use the personal powers in the document, the persons chosen by the grantor or two professionals would be required to find that the grantor was mentally incapable in that respect. There could be ultimate recourse to the courts to determine highly contentious issues.

The use of these personal powers will permit those concerned about the kinds of personal decisions that might be made for them to set out their intentions in order to guide their attorneys. Of course, attorneys cannot follow instructions that would result in illegal acts.

Undoubtedly, there will be fears about how self-determination will be exercised by persons creating personal powers of attorney. Like other once contentious issues, for example, one person/one vote, there may be difficulty in accepting the principles of personal responsibility.

The Committee's view is that, where possible, the decision made by a substitute decision maker should be authentic, i.e., it should be a decision taking into account the values of the person who is mentally incapable. In some cases, where an individual has never had mental capacity or where the substitute decider has not personally known the individual and there are no family to assist in an understanding, authenticity will be unattainable. However, by striving for authentic substitute decisions, the Committee believes that it will be working towards achieving respect for individual differences.

3. Community Living through Access to Support

Human beings are, in large part, social creatures who must live as members of communities. By community, we mean a social group, whose members reside in a particular locale. Moving individuals from their community to care facilities outside that community, no matter how well intended or how well managed, is often detrimental to their well being. Many groups, in the past, have recognized this by using ostracism, or removal from the community, as the ultimate penalty for nonconformity.

Noninterference with liberty does not necessitate neglect. Self-determination is not inconsistent with support. For community living to be a reality for mentally disadvantaged persons, there must be access to supportive services. The services must assist individuals to exercise their intellectual capacities. This Committee believes that the provision of that support is the most important action the government can take for persons who are mentally disadvantaged. Without supportive services, there will be excessive resort to guardianship legislation. Consequently, there will be unnecessary interference with liberty and disregard for self-determination.

We live in a welfare state. Essentially, it means the community is willing to support and assist persons to gain access to at least the necessities of life. Family and disability allowances, welfare, subsidized housing, legal aid, universal medical and hospital care are a few manifestations of our welfare state.

The major beneficiaries of the welfare state are not the handicapped. Doctors, dentists, lawyers, teachers, architects, professional engineers, psychologists, social workers, technologists, and all of us who have prospered in this society have been educated, trained and supported by the state. Medical services have been supplied. Property has been protected. Dishonesty in the trading markets has been scrutinized. For most persons, our welfare state has provided opportunities to exercise liberty.

As minor beneficiaries of the welfare state, persons who are physically and/or mentally handicapped have paid a price for support. This has often involved a surrender of self-determination and segregation from the community.

Creating opportunities to exercise liberty should be the objective of community services for persons who are mentally handicapped. Finally, opportunities are being created for persons who are physically disabled. Wheelchair ramps, transportation, closed-captioned broadcasting, and employment opportunities are allowing people who are physically handicapped to be members of the larger community. One major application of this principle now provides opportunities for the persons who are identified as developmentally handicapped (formerly referred to as mentally retarded).

Good news is seldom reported. Whether it is a feature of human nature or a cultural phenomenon, we seldom observe what is going right. Adults who are identified as developmentally handicapped who once lived in residential care facilities are now living in the community. Some of these persons are in group homes; others are in apartments. These individuals are experiencing richer lives. Many are making their own decisions and exercising life skills that they were thought incapable of exercising. Most of them were determined to be mentally incompetent.

How was this accomplished? The Ministry of Community and Social Services and community agencies worked together to achieve this objective. Community residential facilities have been created, and social services and vocational training programs developed. However, a component without which the transition would not have been successful was the establishment of the Adult Protective Services Program.

The Adult Protective Services Program began in 1974. The earlier "Hamilton Project" suggested that the needs of persons who are identified as developmentally handicapped were largely social rather than legal, and that it was more important to establish a service system to provide supervision and follow up than to develop an elaborate system for legal guardianship. The Adult Protective Service Program was designed to create this alternative by providing direct services to individual adults. Adult protective service workers are employed and supervised by local generic (e.g. Y.M.C.A., Public Health) or specialized (e.g. an association for community living) agencies, which are funded 100% for this service by the Ministry of Community and Social Services.

The Adult Protective Services Program is available only to adults who are identified as developmentally handicapped and are eighteen or more years of age, who live, or are expected to live with some degree of independence in a community setting but who need social support.

A Major Example - The Adult Protective Services Program

The service is provided on a professional-client basis. The adult protective service worker does not have guardianship or custodial authority for his or her client. The client is not compelled to accept any service. The client may discontinue the relationship with the adult protective service worker. While the service continues, the adult protective service workers are expected to make needed services available to their clients. The APSWs perform the following functions:

-- Lifeskills Counselling: The APSW may teach the client, where no other resources are available, daily living skills such as budgeting, hygiene or use of transportation, so that the client may become more independent.

-- Medical/Dental Care Co-ordination: The APSW ensures that medical and dental care visits are scheduled regularly.

-- Accommodation: The APSW provides counselling and guidance to the client in locating, securing and retaining suitable accommodation.

-- Temporary Money Management: The APSW may manage money provided under various welfare assistance acts on a short-term basis, while the client is being trained in money management.

-- Case Management: The APSW links the client to various service agencies to ensure that needed services are effectively provided.

-- Advocacy: The APSW speaks for clients in dealing with community agencies providing services and landlords to ensure that the client's rights are not compromised.

If a client is involved in a legal proceeding, the APSW helps his or her client to understand what is happening.

-- Crisis Management: The APSW is on call in case of a major crisis in the life of a client. This assistance in coping with the emotional distress allows the client to continue to live in the community.

The services of the APSW are provided in a non-threatening environment, for example, the client's home. Through the provision of these services, a client can live a more normal life as part of the general community.

The deinstitutionalization, or normalization, of persons who are identified as developmentally handicapped contrasts with the experience of psychiatric patients who were returned to the community. For most psychiatric patients, there are no similar services. Those with head injuries may also lack support. Many seniors who are mentally handicapped, though provided with a number of community services, do not have the assistance of community workers to support them in making their own choices.

A critical need is the development of a system of services to support the mental capacity of persons who are mentally handicapped who lack social support to make decisions. Without such support, many psychiatric patients will continue to exist in a revolving door leading back to the psychiatric facilities. Many with head injuries will be unable to establish lives in the community. The elderly at risk will require staggering numbers of facilities in which they can be given care. Even if society can afford the financial costs of inaction, it cannot afford the loss of freedom, self-determination and the exclusion of individuals from the community that will result from failure to act.

(Much of the above is taken from: A Guide for the Adult Protective Service Worker, Ministry of Community and Social Services, December 1982).

REPORT

AND

RECOMMENDATIONS

I A PUBLIC SAFETY NET

There exists in the office of the Public Trustee a safety net to make property decisions where a person becomes mentally incapacitated, with no family or friends empowered to manage the property. The office was created in 1919 as a public service for the disadvantaged in need of estate management. Today the Public Trustee performs numerous functions, although property management remains its major role. Under the Mental Incompetency Act, the Public Trustee can be appointed committee or manager of an incompetent person's estate. Under the Mental Health Act and the Developmental Services Act, the office becomes a person's committee when the person is medically certified as incapable of managing property. The Public Trustee may take an appointment as someone's attorney, be granted letters probate, be appointed trustee of a will and act as litigation guardian. The office also administers and oversees charities.

There is a critical need for the establishment of a public office to serve as safety net for persons who are mentally incapable who are without family or friends to act for them in making necessary personal care decisions.

There is a particular need for a public safety net where an individual who is mentally incapacitated is being abused or neglected by those who have responsibility for the care of the individual. The number of such cases reported is growing, especially among the elderly. At present, there is no public official who can apply to court for guardianship. Public health and social agency officials' hands are tied as they are without jurisdiction to act. A Public Guardian and Trustee's office would fill this void. Evidence of abuse or neglect could be gathered by those public officials who discover it and presented to the Public Guardian and Trustee for the purposes of an application to court. Under the court ordered guardianship, individuals in need of protection who are mentally incapable and for whom no less intrusive procedure would be sufficient could be removed to places of safety.

The Committee believes that the Public Guardian and Trustee ought to have a major role in screening applicants for conservator and guardian. The office should also have an advisory role and the duty of monitoring the decisions made by conservators, personal attorneys and guardians and intervening where there is risk to an individual. If conflicts arise between substitute decision makers, the Public Guardian and Trustee should be mandated to mediate disputes between private parties to avoid unnecessary court applications.

Set out below are the Committee's recommendations for the establishment of an expanded public safety net, namely a Public Guardian and Trustee. Each recommendation or set of recommendations is preceded by a brief discussion which identifies the reasoning and policy behind the position advocated.

The last set of recommendations, emergency entry, is separate from those dealing with the Public Guardian and Trustee. A significant number of individuals are in urgent need of immediate medical attention. These are people who have not made arrangements for someone to gain access to their residences in the event of crisis or whose arrangements have failed. Recommendations 2.0 to 2.2 address the issues of emergency entry of a residence in these situations where access is required to determine the existence of a medical crisis.

A Public Guardian And Trustee

A. An Expanded Public Safety Net

An important part of the Committee's mandate to review the law governing, and related to, substitute decision making for persons who are mentally incapacitated has been a review of personal guardianship. From the outset of deliberations, Committee members acknowledged that the existing public safety net, in the Public Trustee, does not meet some of the major needs of the mentally disadvantaged who are without supportive family and friends or are being exploited, abused or neglected. The Committee feels that it is essential to establish a Public Guardian in Ontario. The draft Substitute Decisions Act sets out the functions to be performed by the proposed Public Guardian and Trustee.

The Committee feels that it is reasonable to expand the office of the Public Trustee to establish a Public Guardian's office. In this Report the combined office is called the Public Guardian and Trustee. From a practical perspective, the existing administrative structure can be utilized to reduce set-up time and cost. More importantly, the office has invaluable experience dealing with and on behalf of persons who are mentally incapable and their family and friends, as well as with physicians, social workers, public health officials, social service agencies, etc. Again from a practical standpoint, a combined office would most efficiently and expeditiously handle cases where a person requires both conservatorship and guardianship.

The new office should be organized as two Divisions, the Public Guardian Division and the Public Trustee Division. The Public Trustee Division would perform the functions now performed by the Public Trustee and the

Public Guardian Division would perform those functions related to the person as set out in the Substitute Decisions Act.

Pursuant to this scheme, the Public Guardian and Trustee would continue to operate as a corporation sole under the name "Public Guardian and Trustee of Ontario". This would maintain both the office's legal integrity and independent operation vis-a-vis the Ministry of the Attorney General.

The Committee recommends:

1.0 There should be an office of Public Guardian to be a public safety net for persons, without family and friends to act, who are mentally incapable of personal care and as a result will suffer detrimental consequences unless there is someone authorized to make necessary decisions for them. It should have a mandate to: apply to court for guardianship; act as substitute medical decision maker of the last resort; and have supervisory responsibilities over attorneys for personal care and private guardians.

1.1 The new office should be combined with the office of Public Trustee. It should continue to perform the financial and administrative functions now performed by the Public Trustee for persons incapable of managing property and, in addition, functions conferred on the Public Guardian and Trustee by the substitute decision legislation.

1.2 The office should be organized as two Divisions, the Public Guardian Division and the Public Trustee Division.

B. Service-Oriented and Active

One criticism levied against the existing Public Trustee's office has been that it is not service-oriented. The Committee agrees and recommends that the office become more approachable by promoting its services and assisting persons in their use of its services.

The Public Guardian and Trustee should develop and prepare educational materials and conduct and participate in public information programs to inform the public about the functions of the office. As well, manuals for the guidance of conservators, guardians and attorneys should be produced and made available to persons acting in those capacities. In this way, individuals subject to the proposed legislation and those empowered under it would have a clear understanding of their rights, duties and obligations.

For the Public Guardian and Trustee's office to be truly service-oriented, staff would have to possess a great awareness of human needs in order to effectively interact with and assist those people for whom the office is guardian. Social workers and other service professionals would be needed as part of the staff.

The Committee's proposals, if implemented, would require major change. From an office that is reactive under existing law, it must become an office capable of acting quickly in all parts of the province to prevent serious harm to mentally incapable persons. It is crucial that the expanded office be provided with adequate staff and funding. Much depends on the expeditious and skilful discharge by the Public Guardian and Trustee's office of its more active role.

The office's new active role would be manifested in emergency situations involving exploitation, abuse or neglect of persons who are mentally incapable. The draft requires the Public Guardian and Trustee to make an application to the District Court for temporary conservatorship or guardianship when it is felt that a person is incapable and prompt action is required to provide necessaries to the person or preserve his or her property or in respect of any matter seriously affecting the person. The Public Guardian and Trustee's appointment as temporary conservator or guardian would protect those persons not mentally capable of extricating themselves from their situation.

When resort is made to the court under these emergency circumstances and in situations where crucial substitute decisions regarding treatment are necessary, a speedy determination by the court of whether to appoint a guardian is required. Concern has been expressed that the judicial model is too slow.

The Committee has received assurance from the Chief Judge of the District Court that the Court will be ready and willing to carry out the intentions of the draft provisions and that District Court judges will appreciate the gravity of the applications and will be available to hear them throughout the province. The rapidity with which interim injunctions can be obtained, even in hotly contested labour disputes, clearly demonstrates that the judicial model is not unnecessarily cumbersome when the appropriate legal remedies are in place.

The success of the the judicial process also depends on the ability of counsel to diligently pursue the achieving of the remedy. It is, therefore, imperative that staff of the Public Guardian and Trustee's office be experienced and familiar with bringing forward these matters rapidly for judicial determination. Equipping the office to perform this vital function is one which must receive the highest priority from the Ministry of the Attorney General if the government proceeds with the legislation. It will require careful attention, so that well-trained lawyers with supportive services are available throughout the province.

An active Public Guardian and Trustee, in conjunction with a responsive judiciary, would provide protection for individuals who are mentally incapable who are being abused, exploited or neglected or who require a substitute decision about treatment.

An active Public Guardian and Trustee would also be valuable in protecting recluses who are mentally incapable of personal care and are suffering serious illness or injury. Public health officials report that there are increasing numbers of mentally incapable recluses in both urban and rural Ontario. The medical officers of health and the public health nurses and others on the staff of these offices are frustrated in their efforts to prevent serious harm from coming to those who refuse offers of assistance but who are mentally incapable of deciding whether to accept or refuse help. This frustration is exacerbated by the public expectation of action by health officials which have been expressed in recommendations of coroners' juries.

The Committee believes that its proposals constitute a balanced approach that will protect individual freedom while responding to the needs of those who are mentally incapable of choice and are at serious risk. The Public Guardian and Trustee's office and the necessity of presenting evidence to the District Court in an application would provide protection for the liberty and security of individuals who are mentally capable and choose to reject society's assistance. The existence of the safety net in the form of a responsible office capable of evaluating the evidence and bringing that evidence to court is vital to assure that society in its eagerness to help does not trample on the rights of individuals.

The new roles as service-oriented and as active guardian for persons who are mentally incapable at serious risk will require significant additional funding. A responsive well-staffed and well-funded Public Guardian's office is essential to prevent tragic situations from developing and continuing.

The Committee recommends:

1.3 The office of Public Guardian and Trustee should be oriented to providing a more personal service-oriented role than the existing Public Trustee office.

1.4 The office of Public Guardian and Trustee should be organized to respond quickly to serious situations in all areas of the province, particularly where individuals are being abused, neglected or exploited or where individuals who are mentally incapable are in need of a substitute decision about treatment.

C. Advisory Committees

Under the Public Trustee Act, an advisory committee constituted by the Lieutenant Governor in Council, may make suggestions and recommendations with regard to the general policy respecting the management and conduct of the office. The Committee recommends that an Advisory Committee on Financial Administration be continued. It should be reconstituted to provide greater input from bankers, financiers and the private trust bar. As conservator for many individuals, acting for a fee, the draft legislation requires that the Public Guardian and Trustee exercise in the management of the property, the degree of care, diligence and skill that would be exercised by persons in the business of managing estates. To do so, the Public Guardian and Trustee must have access to that expertise.

An Advisory Committee on Guardianship should be established. It should be composed of the Public Guardian and Trustee and persons appointed by the Lieutenant Governor in Council, nominated by organizations representing the range of persons most affected by and interested in the draft substitute decisions legislation. Most of these consumer organizations are represented on this Advisory Committee. The Public Guardian and Trustee's office would benefit from the expertise of these organizations in the development of policies to meet the public need. The Committee should not have access to information about or participate in decisions affecting individuals.

Both Advisory Committees should report annually to the Attorney General.

The Committee recommends:

1.5 There should be an Advisory Committee on Financial Administration. It should be made up of the Public Guardian and Trustee, one member from the Ministry of the Attorney General, one member from the Ministry of Treasury and Economics, two representatives of the investment community who are not employed by the government, and a representative of the private trust bar.

1.6 There should be an Advisory Committee on Guardianship composed of the Public Guardian and Trustee and persons appointed by the Lieutenant Governor in Council, nominated by:

-- an organization representing persons who are identified as developmentally handicapped;

-- an organization representing those concerned about the protection of civil liberties;

-- an organization representing present or former psychiatric patients;

-- an organization representing the elderly;

-- an organization advocating on behalf of people who are handicapped;

-- an organization representing those suffering from neurological disorders.

1.7 Each of the Committees may make suggestions and recommendations with regard to the policies respecting the management and conduct of the office of Public Guardian and Trustee, as it considers advisable.

1.8 Each Committee should make an annual report to the Attorney General.

D. Medical and Human Service Experts

The third area in which advice from outside experts will be required is consent to psychiatric and medical treatment. Part of the Public Guardian and Trustee's role under the Substitute Decisions Act is to make substitute decisions respecting treatment for persons found to be mentally incapable of consent. The Public Guardian and Trustee will be a member of the Ontario bar and will likely not have training or experience in this area. Medical experts should then be retained to provide medical advice to the Public Guardian and Trustee when the office must make such decisions. The Public Guardian and Trustee should also have authority to retain the expertise of other human service professionals to assist in determining if a non-medical response might be more appropriate in a particular case.

The Committee recommends:

1.9 The office of Public Guardian and Trustee should be authorized to retain medical experts to advise it regarding medical and psychiatric treatment and authorized to retain other human service experts to advise the office regarding appropriate non-medical responses, for persons who are mentally incapable for whom it must make decisions under the Act.

E. Duty of Confidentiality/Obligation to Report

Those connected with the Public Guardian and Trustee should preserve secrecy with respect to the personal affairs or property of a person for whom the office has a duty to act. Confidentiality must be maintained because of the fiduciary relationship created by the continuing power of attorney and conservatorship and the similar relationship and obligations created by personal power of attorney and guardianship.

Exceptions to this general rule should be at the discretion of the Public Guardian and Trustee. Information to be released to a third party must be of benefit to the person for whom the office has a duty to act or necessary for the administration of legislation or in connection with legal proceedings. Provisions in The Equality Rights Statute Law Amendment Act, 1986, respecting the release of psychiatric patient records in the possession of the office, should have precedence over the confidentiality provisions.

The Freedom of Information and Protection of Privacy Act, 1987 will also prevail over the new Public Guardian and Trustee legislation. The release of records from the office will be subject to the Act's provisions, unless the enabling legislation expressly authorizes disclosure. Therefore, it is necessary to set out in the Act establishing the Public Guardian and Trustee the power to disclose personal information to third parties and the circumstances under which the power may be exercised [see S.O. 1987, c.25, cl.21(1)(d)].

In addition to a duty of confidentiality, the Committee feels that the office of Public Guardian and Trustee should fulfill a reverse obligation to report public information on request. Presently, there is no register of persons appointed by the courts to make property or personal decisions for others. Appointments are recorded in each District Court and consequently there is no way of quickly or easily ascertaining the number and authority of committees of the estate and person. It is important that those who have authority to make substitute decisions for persons who are mentally incapable be identifiable and accountable. The Committee feels the office of Public Guardian and Trustee should act as a public register of validated attorneys for personal care, statutory and court-appointed conservators and guardians.

The Committee recommends:

1.10 A duty of confidentiality should apply to those connected with the office of Public Guardian and Trustee such that the office shall preserve confidentiality with respect to the personal affairs, or property, of a person for whom the office has a duty to act.

1.11 The Public Guardian and Trustee should be expressly authorized to disclose personal information to third parties where the information is of benefit to the person for whom the office has a duty to act or is necessary for the administration of relevant legislation or where required by law.

1.12 The Public Guardian and Trustee should be required to inform the public on request of the existence of a statutory or court-appointed conservator, an attorney for personal care whose authority is validated, or a guardian; the name of the conservator, attorney for personal care whose authority is validated, or guardian; and the extent of the authority of the conservator, attorney or guardian.

F. Mediation

Conflicts will arise between private individuals making personal decisions for an incapable person and those making property decisions for that individual. To avoid unnecessary applications to the courts to resolve contentious issues, the Substitute Decisions Act mandates the Public Guardian and Trustee to mediate conflicts where it is not involved as a party. The Committee recommends that the office be authorized to mediate other conflicts that arise in the performance of its duties, again to avoid unnecessary resort to courts as a dispute-resolution mechanism.

The Committee recommends:

1.13 The Public Guardian and Trustee should be authorized to mediate disputes between private parties that arise under the legislation.

Emergency Entry

The establishment of a public safety net in the Public Guardian and Trustee offers a balanced approach to addressing most situations where a personal care problem exists, voluntary efforts to remedy it have failed and there are grounds to believe that the person is mentally incapable of making personal care decisions. Public health authorities would be able to call on the Public Guardian and Trustee to make an application to court for guardianship or in critical situations, temporary guardianship.

Nevertheless, not all cases where an individual is, or becomes, at imminent risk of serious physical harm or death can be predicted. Individuals living alone who are mentally capable can, for example, fall and be rendered helpless, or become unconscious through a reaction to medication. This can happen whether an individual is thirty or eighty years of age.

The law does not permit entry to private residences without the consent of the occupier, that is, the resident. Police officers, to enter premises, must have reasonable and probable grounds to believe that an occupant has committed, or is about to commit, an indictable offence (Criminal Code, R.S.C. 1970, c. C-34, s.450). Therefore, if a person has not made arrangments to enable others to gain access to the residence, or if those arrangements fail, medical officers of health (and police or others) have to break the law by becoming trespassers, in order to save the life of the person. Technically, then, trespass is the practice of the MOH in these emergency situations.

Statutory authority is needed to allow public health authorities to enter private residences where there is no opposition and there is reason to believe a medical emergency exists. The Committee recommends that the Health Protection and Promotion Act be amended to authorize a medical officer of health to investigate the existence of a medical emergency. The medical officer of health should justify forcible entry to the occupier of the residence and to the Public Guardian and Trustee. The justification should demonstrate that there were reasonable grounds to believe that a person was at imminent risk of serious harm or death, reasonable efforts were made to obtain permission to enter and there has been no indication that entry or assistance is unwelcome by an occupier of the residence. The least destructive method of gaining entry should be employed at all times.

This Recommendation is intentionally very narrow. It is not intended to permit authorities to gain access over the protests of a resident. If the person has the strength to indicate that entry or assistance is unwelcome, the authorities will usually have time to attempt to convince the person to allow voluntary access, or where there is sufficient evidence, to seek other legal courses of action, such as temporary guardianship. It is not intended to permit medical assistance against the wishes of the resident. Where, after entry is gained, an investigation reveals that a medical emergency exists, the law permits action to be taken. That law does not permit a person who is mentally capable to be treated against his or her expressed wishes. The Recommendation is not intended as a means to coerce "voluntary" compliance. If the resident asks the MOH to leave after the entry, the MOH would be required to leave.

The presentation of the justification to the Public Guardian and Trustee would result in the compilation of statistics on use of the authority and provide a basis for further analysis of the frequency and distribution of emergency situations.

The Committee recommends:

2.0 The Health Protection and Promotion Act, S.O. 1983, c.10, should be amended to authorize a medical officer of health, and those acting under his or her authority, to forcibly enter a private residence to investigate the existence of a medical emergency where:

- the MOH has reasonable grounds to believe that a person in the residence is at imminent risk of serious physical harm or death, and

- all efforts, reasonable in the circumstances, have been made to obtain permission to enter, and

-- there has been no response from an occupant of the residence to indicate that entry or assistance is unwelcome, and

-- the least destructive method of gaining entry has been employed by the MOH.

2.1 The MOH should be required to give justification for the forcible entry to the person who is believed to be at risk and to any other occupier of the residence and to the Public Guardian and Trustee.

2.2 A form should be developed for presenting the justification and should provide the names of persons who gave information to the MOH and the information given.

II SUPPORTIVE SERVICES

Guardianship legislation has been feared by many people concerned for the civil liberties of persons who are mentally disadvantaged for the reason that it might be used inappropriately by some institutions and individuals. The concern is that persons with diminished mental capacity will fall victim to those who wish to benefit from the arrangement or to those who are well-intentioned but over-protective and that as a result persons who are mentally disadvantaged will lose basic rights and freedoms. The acknowledged shortage of adequate supportive services for persons who are mentally disadvantaged, it is feared, will result in guardianship being used where support would be sufficient; in short, that there will be unnecessary intervention. A similar fear is invoked by proposals for streamlined conservatorship procedures.

The Committee's original mandate included reviewing and making recommendations with respect to voluntary adult protective services as those services related to the Committee's recommendations for changes to the law governing conservatorship and guardianship. The issue surfaced several times as part of other discussions because of strongly-held views voiced by some Committee members as to the central importance of the provision of particular kinds of supportive services. Protracted debate ensued, fueled by conflicting opinions about the linkage or separation of advocacy and case management services, their corresponding meanings and appropriate service delivery models. The matter was not resolved.

In December, 1986, the Honourable Ian G. Scott, Attorney General for Ontario, announced the creation of the Review of Advocacy for Vulnerable Adults to be chaired by Father Sean O'Sullivan. Thus the Committee was for the most part discharged of its mandate respecting the issue of supportive services.

Within the confines of this restricted mandate, this Part of the Report looks at the Committee's recommendations for services supportive of mental capacity. Integral to the draft legislation is the advocate, a safeguard provided throughout the draft Substitute Decisions Act to advise on rights and to help guard against excessive and inappropriate resort to guardianship and conservatorship provisions. The Committee views the services to be provided by advocates as set out in the draft as an essential minimum that must be in place when the proposed legislation is to come into force. All members also agree that there should be supportive services including case management services to persons who are mentally disadvantaged in addition to the limited functions performed by advocates under this proposed legislation. The Ministries of Health, Community and Social Services and the office for Senior Citizens' Affairs are committed to the provision of additional supportive services. Disagreement among Committee members, though strong, is focused on the means of delivering these supportive services.

The discussion of the Adult Protective Services Program in Values Underlying This Report is in no way intended to represent a Committee preferred delivery model. It is set out as an example of a supportive service involving advocacy and case management provided to persons who are developmentally handicapped which is unmatched for other disadvantaged persons who would be affected by the Substitute Decisions Act.

Advocates

Defined in the draft only as persons or classes of persons designated by regulation, advocates are envisaged as functioning to assist individuals who are mentally disadvantaged to make their own life choices. The advocate's role is to support those of diminished capacity through the provision of information, the giving of advice and by speaking on their behalf. By performing this role for those who may have substitutes make decisions for them under the Substitute Decisions Act, advocates help ensure that only those who truly need substitute decision makers will have them.

The functions to be performed by advocates in specific provisions of the Substitute Decisions Act are detailed below. It is perhaps the best method of explaining what an advocate is and does pursuant to the legislation.

1) Court Appointment of Conservators and Guardians

A notice of application for the appointment of a conservator or guardian must be explained by an advocate to the person alleged to be mentally incapable of managing property. The advocate then certifies in a written statement that the visit has taken place and that the significance of the application, and the person's right to oppose the process, has been explained by the advocate.

In the streamlined court process for the appointment of a conservator or guardian, unopposed applications will most often be decided on the basis of documentary evidence. The applicant, counsel, witnesses and the person alleged to be incapable will not be required to appear at the hearing, unless requested to do so by the judge. If this process is to be an effective method of ascertaining mental capacity, it is essential that the proceedings be made comprehensible to those affected by them.

A person alleged to be incapable may be frightened by court proceedings or be unassertive of his or her rights, without being incapable of managing property or of personal care. The advocate's role is to visit the person and explain the nature of the process to ensure that the person has the best possible understanding of what is happening. The visit might reveal that the person is indeed capable of managing property or taking personal care but is being exploited by a family member or friend. On the other hand, the person might be incapable and happy to have a conservator or guardian, yet object to the particular applicant. Where the person wishes to oppose the process, the advocate puts the person in contact with those who can provide legal assistance.

The advocate's visit is a safeguard designed to protect the rights of individuals, who without assistance might not be able to oppose a proceeding that can remove fundamental rights. The advocate effectively gives a voice to those who might not otherwise speak out because of fear, ignorance or misunderstanding. This promotes self-determination. For those who are incapable, the visit may result in the wishes of the person being conveyed and changes made regarding the appointment of a conservator or guardian or in some details of the plans of management or guardianship. Either way, it provides a practical safeguard in a court process that may be disposed of summarily and that has major legal effects on the individual who is the subject of the application.

2) Termination of Conservatorship or Guardianship

Where an application is made to terminate a conservatorship or guardianship by someone other than the person under conservatorship or guardianship, an advocate is required to perform services like those carried out in the appointment process, but for the opposite reason. Here, the advocate must explain the effect of termination, i.e., that the individual must manage his or her property personally or have someone else manage or make his or her personal care decisions. In some situations, the advocate might find that the person does not want the conservatorship or guardianship terminated, for example, where persons bringing the application are trying to exploit the individual. Legal assistance can then be obtained to oppose the process.

Like the appointment process, termination can take place summarily if the application is unopposed. Again the advocate's visit functions as a safeguard for those who may be unaware of what is happening, yet would be seriously affected by the outcome. For those willing and able to live more independently, the visit provides warning and assistance. For persons who are incapable, it protects their right to have decisions made by others.

3) Order for Assessment/Enforcement

In applications for the appointment of a conservator, guardian, interim conservator or interim guardian, or the termination of a conservatorship or guardianship, an assessment of the person's mental capacity can be ordered if the evidence provided is not sufficient to decide the matter. Where entry by professionals for the purposes of an assessment is refused, or where an order to appear in a designated place for an examination is not complied with, the court may issue an enforcement order. This gives the Public Guardian and Trustee and a peace officer the authority to gain access to a person's residence, using force, if necessary, in order to carry out an assessment.

Before an enforcement order can be issued, an advocate must visit or attempt to visit the person ordered to be assessed, to explain the significance of the order. All efforts must be documented and presented to the court. The advocate's visit is to advise the person of his or her rights under the legislation, and explain the options remaining open to him or her.

4) Assessment of Capacity for Statutory Conservatorship and Powers of Attorney for Personal Care

A statutory conservatorship would arise when a person permits a professional assessment that finds him or her mentally incapable of managing property and the person is informed and does not object to the statutory conservatorship (see recommendation 5.3). Before the statutory conservatorship could arise an advocate must visit the person assessed as mentally incapable of managing property and explain that the Public Guardian and Trustee will manage his or her property unless the person objects. The person's right to oppose the statutory conservatorship by simply objecting is also explained. If an objection is made, it is communicated to the Public Guardian and Trustee by the advocate.

A power of attorney for personal care does not take effect unless assessments of the grantor's capacity take place, and reports are made pursuant to the assessments, by at least two persons who are either designated by the grantor or professionals qualified to carry out such assessments. Copies of the reports are served on the grantor by an advocate who explains that the personal power of attorney will take effect and thereby give the attorney the authority to make all personal care decisions on the grantor's behalf that the grantor is unable to make. The grantor's right to oppose the process by simply objecting is also explained, and if an objection is made, it is communicated to the Public Guardian and Trustee by the advocate in a written statement.

The advocate's main function is to ensure that the person being visited is as aware as possible of what is happening. The statutory conservatorship described in Recommendation 5.3 is intended to be non-coercive. A power of attorney is a voluntary assignment of decision making authority to another upon a determination of incapacity. Neither should be imposed on an individual over his or her objections, without due process. Passive but capable individuals should be informed of their rights by an advocate, so that fundamental decisions are not taken away from them unnecessarily.

5) Refusal of Substitute Decisions About Treatment

In the absence of a personal attorney or guardian, family members and friends have authority to make substitute decisions about treatment for a person whom an attending physician considers to be without capacity to consent. An advocate's role is to visit the patient before any treatment begins to explain that he or she was found by the attending physician to be mentally incapable of giving or withholding consent, that another person has claimed the authority to make the decision and what decision was proposed.

The advocate provides support for the patient and neutral advice with respect to his or her rights. The patient may refuse to accept the substitute's decision which would trigger an independent assessment of his or her capacity, and possibly a court application for guardianship. In many cases, the advocate's advice would reduce the fears of the patient about the situation being faced.

6) Annual Visit

Guardians and personal attorneys are required to prepare and file with the Public Guardian and Trustee an annual statement. The statements must include a report of an advocate's visit to the person incapable of personal care. The visit of the advocate is to ensure that the personal attorney or guardian is aware of programs to assist the person who is incapable and to provide some assurance to the public that those who are incapable who have substitute decision makers are not being neglected or abused.

Principles of Advocacy

The Committee submitted the following Statement of Principles to Father Sean O'Sullivan and the Review of Advocacy for Vulnerable Adults on February 18, 1987.

Statement of Principles Regarding the Provision of Advocacy Services to Mentally Disadvantaged Persons

The Advisory Committee on Substitute Decision-Making for Mentally Incapable Persons has been given responsibility for developing new legislation to govern conservatorship and personal guardianship for persons who are mentally incapable. An important facet of this responsibility is to consider the related role of supportive services such as consensual advocacy in meeting the needs of persons who are mentally disadvantaged and in helping to ensure that guardianship and trusteeship are never used inappropriately.

It must be emphasized that the presence of a mental disability does not, in itself, indicate a need for guardianship. Appointment of a substitute decision-maker is necessary and justifiable to the extent that an individual lacks the mental capacity to make the decision and as a result is at risk of harm. Many persons who are mentally disadvantaged are capable of making decisions for themselves, but require assistance to understand the implications of a decision or lack of decision and alternative courses of action. An individual's mental capacity may be such that he or she is able to make some types of decisions but not others, depending on the level of complexity. In the community and in institutional settings, the autonomy of individuals thought to be mentally disadvantaged may be vulnerable. The Advisory Committee has identified a need for advocacy services to provide support and assistance where required by a client in his or her decision-making and to advocate for the client and on behalf of persons who are mentally disadvantaged collectively.

1. Population to be Served

Persons to be served by the advocacy services include individuals in institutional care settings as well as those individuals living in the community who may require such services. In particular, the advocacy services should be available to persons whose competence may be the subject of proceedings under the Substitute Decisions Act (or the current legislation it is intended to replace).

2. Objectives of Advocacy Services

The advocacy services for persons who are mentally disadvantaged should have the following objectives:

to promote respect for the rights, freedoms and dignity of the persons they serve, both individually and collectively;

to ensure that their clients' legal and human rights are recognized and protected;

to assist their clients to receive the health care and social services to which they are entitled and which they wish to receive;

to enhance the autonomy of their clients by advocating on their behalf, both individually and collectively;

to assist their clients to lead lives that are as independent as possible, and in the least restrictive environment possible;

to help protect persons who are mentally disadvantaged from financial, physical and psychological abuse;

to fully explain the implications of and provide advice with respect to guardianship and conservatorship under the Substitute Decisions Act (or the current legislation it is intended to replace).

3. Design of The Advocacy Services

This statement of principles applies to the advocacy services that are funded by the government.

(a) The advocacy services should be designed having regard to:

i) the varying needs of persons to be served;

ii) the variety of institutions and communities in which these persons live;

iii) the most effective means of delivering advocacy services;

iv) the need for advocacy services to function independently of health care and residential facilities.

(b) An advocacy service should have a means by which to advise the government or agencies providing services to its clients, on systemic problems affecting the rights of its clients, and recommended solutions.

(c) If an advocacy service is established to serve clients in care facilities, its advocates should be free to establish a physical presence in the facility.

(d) An advocacy service should have an outreach component to ensure that persons in need of the service will be aware of its existence. A client should have the right to free and unimpeded access to and confidential communication with an advocate.

4. The Nature of the Advocate-Client Relationship

The advocate serves his or her client on a voluntary, consensual basis. The actions of an advocate are guided by instructions, usually given by the client, and in some cases (described below) by a substitute decision-maker. The advocate is not authorized to make substitute decisions and, therefore, must not substitute for instructions his or her own personal or professional view of how to serve the best interests of the client.

In law, individuals are presumed to be mentally capable. In determining if a client is capable to instruct, the advocate begins with this presumption. In respect of a subject matter about which the client has been found to be mentally incapable (e.g., financial management) and a substitute decision maker is authorized to make decisions (e.g., conservator or guardian), an advocate's function is restricted. The advocate can do on behalf of the client no more than the client has legal authority to do. The advocate can convey to the substitute decision maker and others the client's wishes and preferences. Where the client and the substitute decision maker are not in conflict, the advocate may take the requested action. If the advocate has reason to believe that a substitute decision maker is acting improperly he or she should report this situation to the Public Guardian and Trustee. The advocate may also assist an incapable person to exercise his or her rights under the legislation governing substitute decision making and other legal rights the incapable person may have with respect to liberty and security.

5. Role of the Advocate

In addition to providing one-to-one support and advice, the advocate represents the client's interests and intercedes on his or her behalf. The advocate also has a role in lobbying for systemic change on behalf of persons who are mentally disadvantaged.

The advocate must be able to respond to therapeutic and other non-legal issues by representing the client directly or by making appropriate referrals. An important role for the advocate is to provide service to individuals who are the subject of mental incompetency applications. The advocate should be promptly notified of individuals in this situation so that he or she may provide rights advice and make arrangements to secure legal representation if requested.

6. Access and Confidentiality

In order to fulfill their role and responsibilities, advocates must be assured of the opportunity for access to their clients and the confidentiality of advocate-client communications must be protected. The Committee recommends that the following principles with respect to rights of access and confidentiality be embodied in a statute.

(a) An advocate should not be obstructed in his or her attempts to serve a client. The advocate should have the opportunity to determine whether or not a person wishes to become or remain a client of the advocate. Where an advocate-client relationship has been established, the advocate should be fr[illegible] to contact the client without interference from others.

(b) The client should have a right of access to his or her records. With the client's consent, the advocate should have the same right of access to the client's clinical records as the client has him or herself.

(c) As a general rule, without the client's consent, or the guardian or conservator's consent if the client is incapable of expressing an opinion, an advocate should not be a compellable witness and should not be compelled to produce records regarding confidential communications undertaken as part of advocacy for the client. In certain circumstances, there will be exceptions to this right of confidentiality. For example,

   (i) where access is required to ascertain whether or not the advocate has acted negligently

   (ii) where a client dies in circumstances in which it would be in the public interest for the advocate to testify at an inquest.

7. The Implementation of the Substitute Decisions Act and Advocacy Services

If the Substitute Decisions Act becomes law in Ontario, some of the cumbersome, expensive, and time-consuming processes which are currently available to authorize substitute decision-making will be replaced by more streamlined alternatives. While this legislation has been drafted to respect the rights of the individual, the Committee does not wish to increase the risk that people who are competent to make decision will lose their right to do so.

To make people subject to this legislation without providing them advocacy services should therefore be avoided. The Committee recommends that the Substitute Decisions Act not come into force until advocacy services, supported by appropriate legislation, are operational and are available to the persons that would be affected by the Substitute Decisions Act.

III SUBSTITUTE DECISION MAKING

This Part sets out recommendations for revision of the law dealing with substitute decision making. Each recommendation or set of recommendations is preceded by a brief discussion which identifies the issue or need that the Committee addressed and explains the reasoning and policy behind the position advocated. For more detailed remarks, reference is made to the commentary accompanying the draft Substitute Decisions Act which provides guidance for interpretation and understanding.

Recommendations are divided into three sections, General, Property and The Person, and the latter two are subcategorized.

GENERAL

A. Legislation

1. Need for a Principled Foundation for the Law of Mental Incapacity:

The Mental Incompetency Act, the Mental Health Act, the Developmental Services Act, and the Powers of Attorney Act all deal with one or more aspects of mental incapacity. These statutes were enacted and have been amended at various times over the course of more than a century. In addition, regulations under the Public Hospitals Act also purport to provide for substitute consent to medical treatment. While these laws do not technically conflict with one another, no attempt was made in Ontario to develop a principled approach to substitute decision making. Instead, each statute was enacted and amended to meet particular concerns that have arisen from time to time. One result is that there is a lack of coherence in the rules governing when and how persons may have their rights to control their lives or property removed and the powers and duties of those who act as substitute decision makers. Another result is that care givers and persons entering into transactions with persons who are mentally disadvantaged are unclear as to their proper course of action.

This lack of a coherent foundation in principle is most obvious with respect to guardianship of the person. The existing provisions in the Mental Incompetency Act are so uncertain as to provide no guidance to the courts, the government, health and social service organizations, and the community. As stated in "Government Benefits, Wills and Guardianship for People with Handicaps in Ontario", a publication for the Ontario Association for Community Living, formerly the Ontario Association for the Mentally Retarded, by Mary Louise Dickson, (1983):

> There are, in fact, so few precedents for appointment of guardians of the person under the Mental Incompetency Act that no detailed account of the law governing this procedure can presently be given.

Opposition to revision of guardianship legislation has been motivated, in part, by the intent to minimize recourse to legislation that gives one person the right to make personal decisions for another. However, where a person lacks capacity to make an important decision, there is nothing laudable about denying a necessary service or alternatively, providing it without required legal authority. Guardianship provisions are necessary to ensure that important substitute decisions are made only where necessary and in the most responsible and principled manner.

2. Codification of the Law:

The legal mechanisms for substitute decision making have grown up from several different origins. Powers of attorney, medical certification of incapacity to manage property, and court appointments of persons to manage property and make personal decisions for a person who is incapacitated together provide a range of options for substitute decision making. It is difficult, however, for non-lawyers (and even lawyers who do not work exclusively in the field) to find this body of law. The law should be codified so that it is accessible to those who need to use it.

3. Clarity of the Law:

Finding the appropriate body of law is vital. Equally important is the ability to understand that law. Thousands of non-lawyers must base their actions on the law of incapacity. To the greatest possible degree, the law should be comprehensible to them, so that they may be guided by it. Included among those who rely on this law are: persons contemplating conferring a power of attorney on another; attorneys acting under powers of attorney; physicians; and public and private institutions, including hospitals, homes for the aged and nursing homes. If the law is to be followed, it must be capable of being understood.

The Committee recommends:

3.0 One Act should govern all forms of substitute decision making for persons who are mentally incapable.

3.1 The Act should deal with:

-- powers of attorney for property;
-- provisions to authorize and govern the management of property by the office of Public Guardian and Trustee (and family and/or friends in its place);
-- court appointment of conservators to manage property;
-- powers of attorney for personal care;
-- substitute consent to medical and psychiatric treatment;
-- court appointment of guardians.

B. Presumption of Capacity

Under the Ontario Human Rights Code, S.O. 1981, c.53 (as amended by S.O. 1986, c.64), a person who is mentally handicapped or disadvantaged has the right to equal treatment with respect to services, accommodation and employment.

To reinforce the rights of persons who are mentally disadvantaged to obtain goods and services, the service provider should be required to presume the capacity of the person with whom he or she is dealing. To ensure that this can be done, a presumption of capacity should be codified so that providers of services and goods can rely on it. The presumption should legally protect providers of goods and services when they deal with individuals unless there are reasonable grounds for believing an individual to be incapable of contracting or consenting to the proposed service.

(Also see section 3 commentary.)

The Committee recommends:

3.2 To reinforce the rights of persons who are mentally disadvantaged to obtain goods and services the legislation should codify the presumption of capacity to contract or consent. Everyone should rely upon this presumption, unless he or she has reasonable grounds to believe that the person with whom he or she is dealing is mentally incapable of entering into the contract or giving consent.

C. Incapacity Defined

Laws governing incapacity involve the removal of the right to self-determination from individuals subject to the legislation. The determination of when the law should permit intervention is, therefore, crucial.

The ability to make an informed choice is the essence of mental capacity. Mental incapacity means the incapacity to understand information relevant to making a decision or the inability to appreciate the consequences of a decision or lack of decision.

Mental incapacity must be defined so that persons who are capable of making a choice or decision will not have those choices or decisions interfered with, even if most members of the community consider them eccentric or even bizarre. "Capable" would include the ability to make choices or appreciate consequences with the assistance of others. We receive information from explanation and thus we rely on explanation for understanding. Therefore, when a person accepts the assistance of another and is able to understand a concept that would not otherwise be understood, the person is capable.

(Also see commentary accompanying sections 6 and 41.)

The Committee recommends:

3.3 Mental incapacity should be defined so that legislation to provide substitute decision making for persons who are incapable cannot be used to interfere with the freedom of action of persons who know what they are doing and appreciate the consequences of their acts, or who can do so with assistance.

D. Counsel for Persons Who are Alleged Incapable

A court finding of the mental incapacity of an individual has grave consequences for the individual with respect to fundamental rights and freedoms. Personal care and/or financial decisions are taken away and transferred to someone appointed to act as substitute decider. The substitute often determines how the person who is incapable is to live.

It is assumed that the majority of applications for conservatorship and guardianship will be unopposed because the subject of the application is mentally incapable of understanding the nature of the proceedings. However, the court needs the power to direct the provision of legal representation for a person who contests an application or simply when representation is warranted. Such representation by a lawyer ensures that an individual's rights are protected as much as possible and may prevent needless determinations of incapacity. The office of the Public Guardian and Trustee is appropriate to make such arrangements.

A lawyer can only act on a client's instructions. In a proceeding where the mental capacity of a person is at issue, it is, therefore, necessary to deem the person capable of retaining and instructing counsel. Otherwise the issue of incapacity is predetermined under existing civil procedure rules involving the appointment of a litigation guardian.

(Also see section 4 commentary.)

The Committee recommends:

3.4 In a legal proceeding in which the mental capacity of a person is an issue, the court should have authority to direct that legal representation be provided for the allegedly incapable person. The office of the Public Guardian and Trustee should be responsible for arranging for representation.

3.5 Whether or not the provision of legal representation is directed by the court, a person alleged to be mentally incapable should be free to choose his or her own legal counsel and to reject counsel proposed by the Public Guardian and Trustee.

3.6 To ensure that legal counsel will be free to act and to preclude prejudging the issue of mental capacity, a person whose mental capacity is an issue should be deemed to have capacity to retain and instruct counsel.

E. Principle of Interpretation

The Committee believes that guidance in interpretation would be helpful to judges in conferring powers with respect to guardianship and conservatorship and is essential to conservators, guardians, attorneys and those consenting to treatment for another pursuant to the legislation. Actions taken pursuant to the Act should be those which least restrict the liberty or intrude into the life of the person who is mentally incapable.

Following the principle of interpretation, courts will not confer powers on a guardian that are not warranted by the facts and thereby permit a greater restriction of freedom than is necessary. The principle of interpretation would assist the court in determining whether to replace substitute deciders who take actions more intrusive and restrictive than are needed.

The Committee recommends:

3.7 The Act should provide that any action taken under it, in respect of the person or property of an individual who is mentally incapable, shall be the least restrictive or intrusive of the actions that are authorized and appropriate in the situation.

PROPERTY

i) Age for Property Decisions

Any age provision is arbitrary. Capacity to deal with property, like other capacities, develops differently from one individual to another. However, because a very important aspect of property decisions is the right of innocent third parties to rely on the transactions, the certainty and predictability of transactions are essential. The Committee feels that eighteen, the age of majority, should be the age at which a person may make a power of attorney for property, have a conservator appointed to administer his or her property or act as an attorney or conservator for another. The Children's Law Reform Act provides for the appointment of a guardian of a minor's property. Other considerations apply to the age recommended by the Committee for personal care decisions. (See p. 134)

The Committee recommends:

4.0 Under the legislation, the age of eighteen should be the minimum age at which:

- -- an individual may appoint an attorney for property or have a statutory or court-appointed conservator appointed under the legislation;
- -- an individual may act as an attorney for property or as a conservator.

ii) Powers of Attorney

A. Continuing Powers

A power of attorney for property is written authorization for the attorney named in the document to do on behalf of the grantor anything in respect of property that the grantor could do, except to make a will. The power of attorney can contain restrictions and conditions with respect to its exercise.

In 1979, the Powers of Attorney Act was amended to allow persons to create a power of attorney which would survive mental incapacity. A second amendment in 1983 extended this "continuing power" to situations where the grantor is certified as mentally incapable of managing property under the Mental Health Act. These changes came in response to community demand. Unlike earlier times, most people today have some property or benefits which require actions to be taken on their behalf by someone with legal authority.

The continuing power of attorney enables the grantor to manage his or her property while capable, and to make timely arrangements for future incapacity. An attorney can be appointed to take over management of the grantor's property when the person becomes mentally incapable. Concerns of the grantor can be met by placing safeguards on the power. In this way, the dignity of the individual is maintained and the state is not significantly involved. The continuing power also benefits families who are able to assist their members who become mentally incapable of managing their own property.

A grantor capable of managing property should also retain the power to revoke a continuing power.

(Also see section 8 commentary.)

The Committee recommends:

4.1 Adults should continue to be able, as they can under the Powers of Attorney Act, by making a continuing power of attorney, to grant to another, their attorney, the right to manage their property after they have become mentally incapable.

B. Witnessing

An attorney's authority stems only from the capacity of the grantor. At law, no power of attorney exists unless the person creating it understands the nature and consequences of the document being signed. The Committee is concerned about continuing powers that are being signed when the grantor has no such understanding. Because the consequences of the power's creation are so significant, more stringent safeguards are required.

To better ensure that grantors of the power understand what they are doing, two witnesses should be present when the power of attorney is signed. The witnesses should then certify, in writing, that, in their opinion, the grantor appreciated the nature and consequences of the power. Persons who have a conflict of interest with the grantor should not be witnesses. These include family of both the grantor and the attorney, the staff of residential or personal care facilities and anyone engaged in litigation against the grantor. The Committee understands that these safeguards will cause inconvenience to grantors creating the powers. Relatives who may seem appropriate are excluded. It will be difficult to find witnesses. Nevertheless, continuing powers of attorney confer great authority on the attorney and are intended to operate when the grantor of the power is not mentally capable of supervising the exercise of the authority.

The Committee possesses the same concern about the revocation of a continuing power of attorney as it does about its creation. The same safeguards should then apply. It is felt that requiring two independent witnesses will dissuade those who might consider abusing continuing powers. The signing of a statutory certificate also impresses upon the witness the gravity of the situation. The Committee believes these creation and revocation safeguards will remove some of the existing dangers to grantors but will also result in continuing powers remaining a practical tool.

(Also see commentary accompanying sections 9 and 10.)

The Committee recommends:

4.2 More stringent witnessing requirements should apply to the creation of a continuing power of attorney and to its revocation, so that there is greater assurance that the grantor of a continuing power is mentally capable when the power is given or withdrawn. The continuing power of attorney is an important document and to ensure that there is certainty about its status, the rules for revocation should be as clear as for its creation.

4.3 The attorney and the attorney's spouse should continue to be ineligible to be witnesses to a continuing power or to its revocation. The grantor's family, the attorney's family, the staff of a facility at which the grantor receives board or other personal care, and anyone engaged in litigation against the grantor should be ineligible to witness a continuing power.

4.4 The number of witnesses to the creation or revocation of a continuing power should be increased from one to two.

4.5 Witnesses to a continuing power of attorney or its revocation should be required to certify, in writing, that they are of the opinion that the grantor was mentally capable of managing property when the grantor signed the document.

C. Duties

Attorneys in discharging their functions act in a fiduciary capacity. A fiduciary is a person with a duty to act for another's benefit in matters connected to the instrument which created the special relationship. As many attorneys will not have ready access to legal advisors, the Committee believes that basic obligations and duties should be set out as a guide for attorneys acting under a continuing power. Honesty, integrity, good faith and the avoidance of conflict of interest are the essence of the fiduciary obligation.

The Committee recommends that the traditional standard of management imposed by the courts on trustees be applied to attorneys acting, without fee, under a continuing power. The objective standard requires that an attorney exhibit the same diligence, care and skill in the management of the grantor's property as an ordinary prudent person in business would exercise. Duties must be performed in a hard-headed, business-like fashion. An attorney who is not able to live up to the obligation should refuse the appointment. This standard provides clarity and is well known to the courts.

An attorney who is paid a fee for managing property should exhibit an even higher standard, that of persons in the business of managing estates.

To ensure that attorneys competently administer grantors' finances, those concerned should be able to have the administration reviewed by the court. This "passing of accounts" is a complex and expensive procedure. In most cases, the threat of an application for a passing of accounts will be sufficient leverage for those with concerns to obtain detailed financial information from the attorney managing the property.

The above duties of attorneys reflect the seriousness of the substitute decider's role with respect to the grantor's property. Where a duty is breached, therefore, an attorney acting under a continuing power should be liable to the estate for resulting damages. Circumstances will arise, however, when the court should be empowered to relieve the attorney, either wholly or partly, from personal liability. Such is the case where an attorney, such as a family member, fails to exercise the standard of care, diligence and skill required by the legislation, yet, still acts honestly, reasonably and diligently.

(Also see commentary accompanying sections 32,33 and 39.)

The Committee recommends:

4.6 Attorneys acting under continuing powers of attorney should be subject to certain statutory duties:

- to act with honesty and integrity, in good faith and for the benefit of the person who is incapable;
- when not receiving remuneration for managing, to exercise care, diligence and skill in the management of the property according to an

objective standard of an ordinary prudent person in business;

-- when receiving remuneration for managing, to exercise care, diligence and skill in the management of the property according to an objective standard of a person in the profession or business of managing estates;

-- to pass accounts when required to do so by the court.

4.7 An attorney acting under a continuing power should be liable to the estate for damages arising from a breach of duty, but the court should be authorized to relieve the attorney from liability, in whole or in part, where the court is satisfied the attorney acted honestly, reasonably and diligently.

iii) Statutory Conservatorship

D. Public Guardian and Trustee as Statutory Conservator

There is a spectrum of opinion among members of the Committee on all aspects of the Mental Health Act provisions regarding the management of property of persons who are patients of psychiatric facilities and are certified as incapable of managing property.

Despite the concerns of some members who believe that no special system should apply to psychiatric patients, the Committee recommends the retention of the current system of medical certification of mental incapacity to manage property under the Mental Health Act for patients of psychiatric facilities. Under this system, the Public

Trustee is instituted as a patient's statutory conservator upon certification. Compulsory examinations take place when a person becomes a patient of a "psychiatric facility". Pursuant to the regulations under the Mental Health Act, most hospitals in Ontario are designated "psychiatric facilities". If the physician determines that the patient is not capable of managing property, the physician is under a duty to certify the finding and inform the Public Trustee. The Public Trustee is then able to protect the property of persons during a period of medical crisis where action may be necessary to prevent financial loss. Because the vast majority of psychiatric admissions reflect an acute state of mental disorder, the Committee is prepared to make an exception to the general rule of a due-process court procedure in favour of a medical certification procedure.

There is concern about the inappropriate use of the procedure. In some cases, for lack of a cost-effective court procedure for determining incapacity to manage property and appointing a manager, the medical certification procedure is used to certify persons who have no connection with the psychiatric facility other than the registration of their names at the facility and examination by a medical doctor connected with the facility. For this reason, the Committee recommends that the Mental Health Act provision not apply to persons who have no treatment connection to the psychiatric unit of a Schedule 1 facility. This would prevent abuse of the provision in public hospitals and nursing homes and protect the civil rights of patients and non-patients.

The Committee is almost evenly divided on the issue of whether the Mental Health Act provision should apply to out-patients receiving active treatment at Schedule 1 facilities. By the smallest of margins, the Committee favours the provision not applying. The justification for the provision applying to in-patients is that they arrive in an acute crisis situation and often immediate action must be taken to deal with their property. The same situation does not exist for many out-patients. The out-patient group includes persons attending a psychiatric facility for family counselling and other non-crisis services. In addition, the personnel and procedures in the Mental Health Act that provide some protection to in-patients -- patient advocates, rights advisors, termination of management by the Public Trustee at discharge or six months thereafter, accessibility of Review Board -- are not effective for outpatients.

On the other hand, at psychiatric facilities with a bed shortage, the seriousness of the confusion of those not admitted but who become out-patients is sometimes as great as those of in-patients. It is also claimed that there are out-patients who because they have the Public Trustee to manage their property are able to live in the community. Without quick access to the service, it is claimed, these individuals would be institutionalized, or worse, would be homeless and helpless on the streets.

The Committee recommends:

5.0 The Public Guardian and Trustee should continue to have the obligation of assuming the management of a mentally incapable psychiatric in-patient's property, but the law governing the Public Guardian and Trustee as manager should be removed from the Mental Health Act.

5.1 When a person becomes an in-patient of a psychiatric facility, there should continue to be an examination under the Mental Health Act to determine if the person is capable of managing property.

5.2 Where the attending physician determines that the person is not capable of managing property, the physician should continue to be under a duty to certify the finding and inform the Public Guardian and Trustee.

E. Professional Certification

The Committee further recommends a second statutory conservatorship procedure which should be available on a voluntary basis for out-patients and members of the general community. The need exists for a non-coercive, non-court mechanism to institute the Public Guardian and Trustee as conservator for individuals in this population. The process would allow families to avoid unnecessary applications to court in situations where there is no doubt about an individual's incapacity, and the person does not object to having a conservator.

The Committee recommends a non-coercive professional certification procedure. Despite concerns that safeguards might delay certification, the Committee believes the following safeguards should apply: no assessment of capacity could be made unless the person is first informed of its purpose and the right to refuse it; an advocate would explain the effect of the certificate of incapacity and the right to refuse the statutory conservatorship; and the person under conservatorship would be able to terminate it at any time by writing to the conservator. The same scrutiny would apply to those administering property pursuant to this process as those who are court-appointed. This procedure would have application to a significant number of persons. It should be noted, however, that a right of voluntary termination at any time may make the non-coercive professional certification procedure inappropriate in some situations.

The Committee recommends:

5.3 A procedure should be established whereby the property of a person can be managed by the Public Guardian and Trustee until the person objects to the management. The statutory conservatorship should arise when the person permits a professional assessment which results in a finding that the person is mentally incapable of managing property, and the person does not refuse the conservatorship. The person should be advised by an advocate that he or she has the right to refuse the conservatorship.

F. Developmental Services Act

The non-coercive statutory conservatorship provisions in Recommendation 5.3 would apply to all persons in Ontario and not just persons governed by the Developmental Services Act. Few persons resident in facilities under that Act are likely to object to an assessment or the management of their property by the Public Guardian and Trustee. All persons to whom that form of statutory conservatorship apply could terminate it by giving notice to the Public Guardian and Trustee.

The Committee recommends:

5.4 The provisions in the Developmental Services Act, similar to those in the Mental Health Act, that provide for medical certification of an individual as mentally incompetent to manage property should be repealed as unnecessary. The existing process is not justifiable in light of Recommendation 5.3.

G. Replacing the Public Guardian and Trustee

The major problem with the medical certification of incapacity to manage property from the community perspective is that management of the property of the person who is incapacitated has been restricted to the Public Trustee. A spouse, family member or friend who has assisted the person to manage the property prior to the certification, can only manage the property if named in a continuing power of attorney or appointed committee of the person's estate by a court.

1983 amendments to the Powers of Attorney Act and the Mental Health Act allow an attorney to take over from the Public Trustee if specific words in the power of attorney address the issue. The existence of the power merely has to be proved and the attorney has to undertake to act according to the power. The law does not allow anyone else to take over.

The Committee wishes to continue the right of an attorney to take over statutory conservatorship and also expand the right to others who are appropriate and willing to take over management. The main concern is to establish a single procedure to review ability and willingness of persons wishing to replace the Public Guardian and Trustee and a single system for their supervision by the Public Guardian and Trustee. The changes the Committee proposes may be slightly more onerous and inconvenient for attorneys than the current procedure, but the guidance to attorneys and the supervision of management by the Public Guardian and Trustee are benefits too great to retain the existing law.

The Committee recommends that an inexpensive, expeditious process be created for the replacement by a suitable applicant of the Public Guardian and Trustee as statutory conservator. The most likely replacement is a person designated to be statutory conservator or an attorney under a continuing power of attorney of the person incapable of managing property. It is also felt that a spouse, family member or friend, who has been in friendly personal contact with the person who is incapable over the preceding twelve-month period, should be able to make an application. This friendly personal contact provision promotes "authentic" substitute decisions. It precludes estranged spouses or family and friends who may not be aware of the person's recent viewpoints and lifestyle. The inclusion of friends is seen as important and necessary. The Committee envisages people who live with or are very close to the person who is incapable, and who, in many cases, know them best. For this reason, they should not be excluded from making an application.

It is imperative that the Public Guardian and Trustee have a major role in screening applicants to ensure that assets are prudently and properly managed. In cases of conflict between the Public Guardian and Trustee and an applicant, the court should be empowered to decide the appropriate manager.

(Also see commentary accompanying subsections 15(1) and (2).)

The Committee recommends:

5.5 The law, as set out in the substitute decisions legislation, should give an attorney under a continuing power of attorney, a conservator designated by the person when capable, family, or friends of the person the right to assume management of the person's property, if they are able and willing to do so.

H. Applicant Requirements

The role of conservator entails significant responsibility. Mismanagement can have grave consequences for the person who is incapable and the person's dependents. The Committee believes that applicants who wish to replace the Public Guardian and Trustee as statutory conservator should establish their suitability to manage property. It is appropriate that the Public Guardian and Trustee play a vital role in the screening of applicants and also maintain an ongoing supervisory role with respect to statutory conservators.

Suitability can be established by demonstrating that the applicant had friendly personal contact with the individual who is incapable prior to the determination of incapacity and also by the development of a plan of management for the property. The Public Guardian and Trustee would receive further assurance that sound decisions would be made on behalf of the person who is incapable by the applicant obtaining a surety bond for the value of the property. Where appropriate, the applicant should be able to apply to court to reduce or eliminate the bond. With these requirements, or safeguards, met, a decision can be made by the Public Guardian and Trustee about the applicant's ability to manage the person's property effectively and for the person's benefit.

An attorney under a continuing power of attorney or a person designated to be statutory conservator should have priority to replace the Public Guardian and Trustee as statutory conservator. Where no designation has been made or the person named is either unsuitable, unwilling or unable to act, family and friends are considered.

Where a person grants a continuing power of attorney or designates a statutory conservator, the screening process serves as back-up protection to ensure proper management of the grantor's property. A plan of management should be submitted to provide this assurance, but because the grantor selected the attorney and/or conservator, a surety bond need not be obtained. Unless the Public Guardian and Trustee is dissatisfied, the attorney or designated statutory conservator would replace the Public Guardian and Trustee.

(Also see commentary accompanying subsections 15(3)-(9).)

The Committee recommends:

5.6 The attorney under a continuing power of attorney, or a person designated to be statutory conservator, should be able to replace the Public Guardian and Trustee as statutory conservator where the attorney or a person chosen to be conservator proves the existence of the power, undertakes to act, and submits a plan of management.

5.7 Other persons applying to replace the Public Guardian and Trustee as statutory conservator should be required to establish their suitability to manage property, develop a plan of management for the property and obtain a surety bond to guarantee proper management (or apply to the District Court to reduce or eliminate the bond).

I. Court Determination of Statutory Conservator

The process of replacing the Public Guardian and Trustee whereby the Public Guardian and Trustee can screen and approve an application is both expeditious and inexpensive. The function is administrative. The Public Guardian and Trustee cannot be given authority to refuse the application of those who wish to persist. The Public Guardian and Trustee should be obliged to apply to the District Court to decide contentious matters. If an applicant is thought by the Public Guardian and Trustee to be unsuitable, for example, where the family member appears to have no ability to manage the property prudently, and the Public Guardian and Trustee's view is disputed, the court should determine whether the applicant is entitled to become statutory conservator. Plans of management, thought inappropriate by the Public Guardian and Trustee, might also lead to a court application. So, too, might situations where two applicants are found suitable by the Public Guardian and Trustee, but the applicants refuse to manage jointly.

Similarly, the Public Guardian and Trustee should be empowered to apply to District Court when the authenticity of a continuing power of attorney is in issue. As a practical matter, the ability of the Public Guardian and Trustee to apply to the court for a determination would screen out unrealistic applications. The court would also be authorized to make appropriate limitations of the powers of the conservators.

The Committee recommends:

5.8 If an application to assume the function of statutory conservator is refused by the Public Guardian and Trustee and the applicant does not withdraw the application, the Public Guardian and

Trustee should be obliged to apply to the court to have the court determine whether the applicant or the Public Guardian and Trustee should administer the property.

5.9 The court should have power to limit the powers of a statutory conservator.

J. Termination

The Committee believes that the provisions under the Mental Health Act for terminating the certificate of incapacity and the subsequent involvement of the Public Guardian and Trustee are appropriate in principle. This means that a statutory conservatorship created following medical certification under the Mental Health Act would terminate and a statutory conservator would relinquish management upon the occurrence of specific events under that Act. Where a person other than the Public Guardian and Trustee is statutory conservator, the Public Guardian and Trustee should be required to inform that person of the termination.

A statutory conservatorship created pursuant to the voluntary professional certification procedure (set out in Recommendation 5.3) should terminate upon the statutory conservator's receipt of written notice by the person under conservatorship revoking it, along with an advocate's statement certifying his or her visit to the person. The conservator should also be able to terminate the conservatorship by giving notice to the person under conservatorship and to the Public Guardian and Trustee.

A statutory conservatorship would also terminate upon the appointment of a conservator by the District Court. This process is described in the next section.

The Committee recommends:

5.10 The statutory conservatorship created following medical certification under the Mental Health Act should terminate:

-- where a physician cancels the certificate of incapability;

-- where the review board under the Mental Health Act or the District Court on appeal determines that the patient is no longer incapable of managing;

-- when a patient is discharged from a psychiatric facility, unless a notice of continuance is issued by the physician examining the patient at the time of discharge;

-- six months after the discharge where a notice of continuance has been issued.

5.11 The statutory conservatorship created pursuant to Recommendation 5.3 (professional certification) should terminate when the Public Guardian and Trustee, or other statutory conservator, receives from the person under conservatorship a direction to terminate and a written statement of an advocate certifying that the advocate has visited the person under conservatorship. It should also terminate when the conservator gives notice to terminate to the person under conservatorship and to the Public Guardian and Trustee.

iv) Court Appointment of Conservators

K. Application for Conservatorship

Where an individual has not made provision for his or her own mental incapacity by way of continuing power of attorney, and where the provisions of the Mental Health Act and the non-coercive non-court process for statutory conservatorship are inapplicable, there is a need for a court-application process. Anyone, including the Public Guardian and Trustee, should be able to make an application to the District Court to be appointed as conservator of a person incapable of managing property. The Public Guardian and Trustee, as safety net, would make applications in cases of suspected exploitation, or where no family or friends appear willing or able to become conservators for a person who is incapable.

The Committee feels that in applications for conservatorship, "incapacity to manage property", should not be enough to justify the appointment of a conservator. Many individuals function adequately despite mental disabilities because the circumstances in which they live do not require major decisions to be made. The incapacity must result in the person being unable to make decisions which, if not made, would have a detrimental effect on the person or his or her dependents. The inability to make decisions would necessitate some other person being authorized to make those types of decisions for the person.

To enable the court to act to protect the interests of those alleged to be mentally incapable, and their dependants, an application should be allowed, even though there is an acting statutory conservator or an attorney acting under a continuing power of attorney. This would permit application where someone is concerned that a statutory conservator, or attorney, is acting inappropriately with the property of a person who is mentally incapable. The court would, thus, have ultimate control over substitute decision making with respect to the property of persons who are incapable.

This process would replace the now outdated Mental Incompetency Act. Transitional provisions should provide for committees appointed under that Act to continue. Application to the court should be for their appointment as conservators for the persons who are incapable for whom they act.

The Committee recommends:

6.0 The Mental Incompetency Act should be repealed. Transitional provisions are required to provide for the continued authority of committees appointed under it.

6.1 The new legislation should provide for court appointment of a conservator to manage property for a person who is incapable, where the person's incapacities result in the person being unable to make necessary decisions relating to property and in need of an authorized person to make those decisions for him or her.

L. Standard of Proof

The right to self-determination is fundamental. It should not be easily removed. This can be achieved by applying the Criminal Code standard of proof beyond reasonable doubt to establish that a person is mentally incapable and in need of a conservator. This safeguard will discourage unfounded applications and secure maximum protection of the rights of those who are subjects of such applications.

The Committee recommends:

6.2 Mental incapacity to manage property and the resulting need for a conservator should be proven beyond reasonable doubt.

M. Application for Appointment of Conservator

Fundamental justice demands that an individual, who may have his or her right to manage property removed, has a right to be heard. The Committee conceives of a process wherein material filed in support of an application ensures maximum opportunity for the person alleged to be incapable to oppose the process and have his or her voice heard.

The notice of application should be served on those who have an interest in the outcome. These include the person alleged to be incapable, the proposed conservator, substitute deciders, the Public Guardian and Trustee and close relatives and friends. Once served, a person could oppose the application, or seek to have a more appropriate conservator appointed.

The Committee feels it is essential that an advocate be involved early in the process. The advocate would visit the person alleged to be incapable to explain the process in order to ensure that the person has the best possible understanding of what is happening. Those who may be frightened by court proceedings or simply unassertive without being incapable of managing property, would benefit most from an advocate's visit. The advocate would assist them in making their wishes known. If they chose to oppose the process, the advocate would put them in contact with those who would provide legal assistance.

The Committee believes the Public Guardian and Trustee should have a role in screening applicants. This would prevent inappropriate persons gaining control of the estate of a person who is incapable. This is particularly important in an unopposed application. The application should be accompanied by the Public Guardian and Trustee's approval or comments on the applicant's plan of management for the property and the appropriateness of the proposed conservator as well as the proposed conservator's consent to act.

The most significant evidence required is that which establishes the person's mental incapacity to manage property. The Committee believes that professional opinions should not be required. Instead, the Committee believes that any two individuals who are well acquainted with the allegedly incapable person and have nothing to gain by the appointment of a conservator, should be allowed to state their opinions of the person's capacity. In some cases, this will be sufficient to establish incapacity. It is necessary also to have provision for assessments by professionals. The court would make a determination about the sufficiency of the evidence.

Regardless of whether the opinions were professional or not, they would take the form of statements in a prescribed form developed for this procedure. This would avoid one of the major legal costs which arises out of the existing court process under the Mental Incompetency Act, lawyer-prepared affidavits. The prescribed forms would also have the effect of bringing before the court only those matters relevant to a determination of capacity to manage property.

The Committee feels that where no objection is made by anyone served with the application, the Court should be authorized to deal with the application without the appearance of counsel and parties. Legal representation would not be required for this procedure. Where documentary evidence is insufficient, or if the application is contested, the court should have authority to require further evidence, hold a regular hearing or have the matter proceed to trial.

(Also see commentary accompanying sections 20, 21 and 22.)

The Committee recommends:

6.3 There should be a procedure for summary disposition of an application to appoint a conservator. Where there is proof of incapacity to manage property, and no objection to the appointment of the conservator, the court should be able to make an order without the appearance of parties or counsel being required. Contested applications would be determined at a hearing with full representation or, when ordered, at trial.

N. Temporary Conservatorship

Situations arise which require prompt decisions to be made respecting the property of a person apparently incapable of managing property. Necessities of life, for example, may need to be provided to the person or to his or her dependants, or specific transactions affecting the preservation of property may need to be carried out, such as the payment of bills or a mortgage to prevent foreclosure. The court appointment of conservator procedure may not be immediate enough to deal with these situations. Therefore, a more expeditious process is required.

The Public Guardian and Trustee should be required to apply for temporary conservatorship in emergency situations. Notice should be provided to the person who is alleged to be incapable, unless the court dispenses with the requirement because of the urgency and nature of the transaction. A lower standard of proof of incapacity, proof on the balance of probabilities, should apply. This is justified because of the circumstances, the limitation of applications to the Public Guardian and Trustee and the limited term of the order. Temporary conservatorship orders should not exceed ninety days. The court should also be able to set out conditions and limitations in the order. Appointed for the temporary period, the Public Guardian and Trustee could provide the person with necessaries and take action to preserve property. The office or a family member or friend could apply for permanent conservatorship where the incapacity is not temporary.

A responsive judiciary and an active, properly-staffed and trained office of the Public Guardian and Trustee are critical to a rapid and effective judicial process. The Committee believes that the recommended judicial model can work as proposed, provided adequate attention is paid to the office by the Ministry of the Attorney General. Reference should be made to discussion of the Public Guardian and Trustee's office (pages 61 to 63).

The Committee recommends:

6.4 There should be a requirement that the Public Guardian and Trustee apply to the court for temporary conservatorship for a person apparently incapable of managing, where there is a property transaction requiring immediate attention or where conservatorship is needed to provide necessities to the person or to his or her dependants. On application, incapacity to manage property would be proven on the balance of probabilities. The application would require notice to the person who is allegedly incapable but the court should be empowered to dispense with notice in case of an emergency. The temporary conservatorship should be limited to ninety days.

O. Termination of Conservatorship

The Committee believes that it should be as simple to terminate an order appointing a conservator as it is to create one. The termination process should, therefore, be similar to the originating procedure. This would entail providing notice to interested parties, a visit by an advocate on the person under conservatorship where the person is not the applicant and statements by two individuals of their opinions regarding the person's capacity and the facts on which these opinions are based.

The standard of proof of capacity should be lowered to the civil standard of proof on a balance of probabilities. The criminal standard protects fundamental rights of the person in the application to appoint a conservator, but would serve the opposite purpose in a termination application. People should not have to establish their capacity beyond reasonable doubt in order to control their own lives. This would violate the right of self-determination.

As with the originating application, the presence of counsel and parties would not be required where the court finds the documentary evidence sufficient and no opposition to the application is received. Legal representation would not be required.

The Committee recommends:

6.5 There should be a summary disposition procedure for terminating a conservatorship by application, similar to the procedure to establish conservatorship.

v) Powers and Duties of Conservators

P. Authority of Conservator

In both the Mental Health Act and the Powers of Attorney Act substitute deciders' powers with regard to the management of property of persons who are mentally incapable are full and absolute. Under the Mental Incompetency Act, the committee has only the specified powers and authority conferred by the court in an order. Whatever the historical rationale for the latter approach was, it is no longer consistent with the other legislation. The Committee believes it is reasonable to bring the powers and authority conferred by a court appointment into line with the approach taken in the Mental Health Act and the Powers of Attorney Act.

Risks in adopting this approach are offset by the fact that conservators are usually bonded and also through provision of specific duties. The court can also limit the power and authority of both statutory and court-appointed conservators and should have the ability to vary existing orders on application. Therefore, conservators should have the authority to do anything in the management of property that the person who is incapable could do. The exception is that a conservator may not make a will for the person under conservatorship. The making of a will is a personal act and is not now and should not be delegable. The Succession Law Reform Act applies where no will is made by the person.

The Committee recommends:

7.0 Unless specifically limited by order of the court, a conservator, whether statutory or court-appointed, should be authorized to do anything in the management of property that the person who is incapable could do, if capable, except to make a will. It should no longer be necessary to bring applications to the court to approve specific transactions.

7.1 The court should be able to limit the powers of a conservator, on application, at any time during the conservatorship.

Q. Contracts and Gifts

A conservator makes property decisions on behalf of and for the benefit of a person who is mentally incapable of making them him or herself. The conservator ensures that the person's needs are met and often must take strict control of property in order to protect the person from exhausting it. Persons who are incapable can be highly vulnerable to being victimized, making purchases they cannot afford or simply giving away money until it is gone. This can occur after conservatorship begins, but often takes place prior to the legal determination of incapacity. To protect persons who are incapable from those who take advantage of their incapacity, the Committee believes that certain contracts and gifts should be set aside by the court where it is equitable in all the circumstances to do so.

The law of contract and the law governing gift provide remedies for situations where one party to a contract or gift does not have mental capacity to enter the contract or make the gift. Because we all rely on contracts the law makes them difficult to set aside. The person desiring to set aside a contract is required to prove his or her lack of mental capacity to understand the nature of the transaction at the time the contract was made and that the other party knew or ought to have known of the disability. It is somewhat easier to set aside a gift. The application of this law to a conservatorship would place the conservator, who is likely to know little of the circumstances surrounding a transaction or gift, in a poor position to recover the property of a victimized person who is incapable.

The Committee has concluded that, while some change to the law is necessary to allow conservators the ability to recover the assets of persons who are incapable given or contracted away during incapacity, major change is not required. The conservator's lack of knowledge and inability to obtain information should be remedied by placing the onus on the defendant to prove that the defendant did not have reasonable grounds to believe that the person under conservatorship was incapable at the time the contract was made or the gift given. The provision should apply to contracts and gifts made during the conservatorship and for the six months preceeding it. The Committee in arriving at this recommendation has considered the interests of persons in commerce and those managing legitimate religious and charitable organizations. It has also seriously considered the need of persons who are mentally disadvantaged to have others rely on the presumption of capacity in order to retain their independence (see subsections 3(3) and (4) of the draft).

The Committee recommends:

7.2 In an action by a conservator to void a contract or gift entered into or made by a person under

> conservatorship, or within six months prior to the creation of the conservatorship, the onus should be on the defendant to prove that the defendant did not have reasonable grounds to believe that the person under conservatorship was incapable.

R. Duties

Specific statutory duties should be imposed to prevent abuse of powers or neglect of obligations by conservators with regard to the management of the property of persons who are mentally incapable. Like attorneys, (Recommendation 4.6), conservators in discharging their functions act in a fiduciary capacity. Their duty, therefore, is to act with honesty, integrity, in good faith and for the benefit of the person under conservatorship. The objective standard of management imposed by the courts in trust cases should be applied, so that the conservator must exhibit the same diligence, care and skill in the management of the property as an ordinary prudent person in business would exercise in the conduct of the business. Paid conservators should be required to exhibit a higher professional standard.

Statutory and court-appointed conservators are required to develop a plan of management for the estate. The conservator should be responsible for performing his or her duties in accordance with that plan of management. It should be treated as an undertaking to the estate which if not followed could make the conservator liable to the estate for damages.

These duties must be performed in a hard-headed, business-like manner. A conservator who is not able to live up to the obligation should refuse the appointment.

(Also see section 32 commentary.)

The Committee recommends:

7.3 Conservators' duties should include:

- the duty to act with honesty, integrity, in good faith and for the benefit of the person who is incapable;
- the duty to exercise in the management of property at least the degree of care, diligence and skill of an ordinary, prudent person in business in the conduct of the business;
- when acting for a fee or other remuneration, the duty to exercise in the management of property, the degree of care, diligence and skill that persons in the profession or business of managing estates would exercise in that profession or business; and
- the duty to act in accordance with the plan of management established for the estate.

S. Guiding Principles for Expenditures

To provide direction to substitute deciders and to ensure the making of "authentic" decisions where possible, the Committee believes that guiding principles for expenditures should be provided. These would apply to conservators. Legal obligations including the payment of debts, must be fulfilled. The conservator should also meet the obligations of the person who is incapable both for his or her own welfare and for those who are his or her legal dependents. Provision should be made for the support, education and care of both, taking into account their accustomed standard of living, and expenditures that are "reasonably necessary" should be made.

Where there is more than sufficient property to meet, and continue to meet, the above obligations, the Committee believes that the conservator should have discretionary power. Where there is evidence that the person who is incapable would have provided assistance to family members or others, the conservator should have the authority to provide such assistance. Again, where assets are ample and the person who is incapable would have done so, the conservator should be permitted to make charitable gifts. A prudent limit on gift giving is 20% of the income of the property in any one year with authority in the court to increase the percentage.

Where a duty is breached, a conservator should be liable to the estate for resulting damages, although the court should be authorized to provide relief from personal liability under the appropriate circumstances.

(See commentary accompanying sections 33 and 35.)

The Committee recommends:

7.4 In the allocation of income and assets of the estate, a conservator should be under the following duties:

- -- to satisfy the legal obligations of the person who is incapable;

- -- to provide what is reasonably necessary for the support, education and care of the person who is incapable and his or her dependents, taking into account their accustomed standard of living;

-- where resources are ample to continue to discharge the above primary duties:

  - to give assistance to friends and family;

  - to make charitable gifts, not exceeding 20% of the annual income of the property, unless varied by the court on application;

as there is reason to believe would have been made if the person who is incapable was capable.

7.5 A conservator should be liable for damages resulting from a breach of his or her duties, but the court should be authorized to relieve the conservator from personal liability, in whole or in part, where it is satisfied that the conservator has acted honestly, reasonably and diligently.

T. Court Direction

The Committee believes that a mechanism is required to resolve highly contentious issues that arise in the management of property. The person who is incapable or the person's guardian, for example, might feel that the conservator or attorney under a continuing power is not providing reasonable expenditures for the personal care of the person who is incapable. It is recommended that the court should be available as a last resort, to provide direction. The person who is incapable, a conservator, an attorney, a guardian or a dependent of the person who is incapable should be able to apply to the court when such situations arise.

(Also see section 36 commentary.)

The Committee recommends:

7.6 A person who is incapable, a conservator, an attorney acting under a continuing power of attorney, an attorney for personal care, a guardian, if any, a dependant of a person who is incapable, or any other person with leave of the court, should be able to apply to the court to have directions given to the conservator or attorney on the administration of property.

U. Compensation

The current practice of courts is to award compensation to committees on the same basis as they do to trustees. Both section 55 of the Mental Health Act and section 29 of the Developmental Services Act provide a clear statutory entitlement to compensation for the Public Trustee in performing his role as committee. The wording of the sections indicate that compensation be allowed "in an amount not exceeding the amount that a trustee would be allowed for like services". While no statutory authority exists for remuneration of private committees under the Mental Incompetency Act, it is well established practice to compensate them on a similar basis.

The courts have worked out a standard of compensation, which at the present time is:

(a) 2-1/2% on all income received by the estate;

(b) 2-1/2% on all capital in or out of the estate; and

(c) a management fee of 2/5ths of 1% per year of the average value of the estate.

There is some concern regarding the capital fee allowance. For example, if a patient who owns real property is certified under the Mental Health Act, he may be released in a week, a year, or perhaps never. If it becomes necessary to sell his property, it is perfectly reasonable to allow the committee 2-1/2% on the capital value realized on the sale of the property and on the disbursement of that capital later to the patient or to the estate. On the other hand, if no action is taken with respect to the real property other than holding the deeds, or if the spouse of the patient is allowed to remain even though the property is registered in the patient's name and eventually the property itself is turned back to the patient or the estate, the 2-1/2% in and out of the capital value is not equitable.

At present, committees appointed under the Mental Incompetency Act do not have a clear statutory right to be compensated. The Committee feels that this right should be clearly set out legally. Further, a simplified fee scale should be established by regulation, setting out as a normal fee a percentage charge on revenue and a percentage charge on capital value. The Committee feels this would be a more appropriate approach than the present fees which reflect the nature of trusts and estates, rather than the nature of conservatorships. The proposed fee scale division would better reflect the work done by the conservator in collecting and disbursing funds, as well as the overall management and investment function. In addition, it would avoid getting into the complexities of the Surrogate Court requirements. The suggested guidelines set by regulation would be annually: 6% of revenue; 3/5 of 1% of the average annual capital value; a 1% one-time, set-up fee at the end of the first year; and a 1% one-time, close-out fee on the close out of the conservatorship.

Simplification is achieved by dropping separate fees for revenue receipts and disbursements and capital receipts and disbursements, and adopting one simple revenue fee for collecting and disbursing same, and one simple capital fee for managing, investing and disbursing same.

The revenue fee of 6% is to be calculated only on income received by the estate. The set-up and close-out fees are one time recognition of the inventorying, gathering in, and developing of a scheme of management regarding the incapable person's assets. The close-out fee is recognition of the fact that the recipient whether the now-recovered individual, or his or her personal representative, or a replacement conservator have the benefit of receiving the assets in an organized, inventoried form, and the effort and expense possibly involved in handling or transferring the assets over.

Obviously, where the transfer is to a successor, conservator, or personal representatives, the successor should not then be able to charge a "set-up" fee because that work has been reflected in the previous conservator's close-out fees.

The above fee structure should be recognized as a normal fee for an account of average complexity. Flexibility to adjust fees should exist to reflect the particular size, activity, and complexity during any particular accounting period. This flexibility to adjust should exist as time goes on when the normal fee may go out of date or become inappropriate.

The Committee feels that a conservator should be able to take compensation on a business-like basis, that is, in monthly or quarterly instalments. This recommendation recognizes a basic business premise that the work should be paid for as it is done. The Ontario Law Reform Commission addressed this subject as it applied to trustees in their recent Report on the Law of Trusts (1984), at pages 258 to 261 of the text, and page 517 to 518 (section 72) of the Draft Bill. The Commission recommends "Trustees should be entitled to general compensation on a regular basis during the administration of the trusts, ... they should be entitled to take sums periodically from the trust fund as compensation, without the approval of the court."

The Commission continues:

> "We therefore recommend that, in the absence of a contrary intent contained in the trust instrument and subject to several specific controls that we shall propose, the revised Trustee Act should provide that trustees may, from time to time during the administration of the trust, pay to themselves or any of them from the assets of the trust such sum as in their opinion is fair and reasonable compensation for their work and time spent on the trust during the period of time to which the payment relates." (See page 260)

It is the Committee's view that in most cases, compensation should be taken on a current basis. This is especially true with respect to compensation on income because:

(a) the deduction of compensation is a charge for income tax purposes; and

(b) current deduction of compensation provides a much more realistic balance for investment purposes or care provisions.

There may be a valid reason why the compensation on capital or set-up fee should not be taken until the end of the administration. For example, a patient could have a $200,000.00 house, but a very limited income after becoming ill. If the conservator was entitled to take a 1% set-up fee on the capital value of the real property, this sum of $2,000.00 might very well prejudice the payment of maintenance on behalf of the patient.

The Committee recommends:

7.7 There should be a statutory entitlement to compensation in favour of the conservator.

7.8 A simplified fee scale should be established by regulation, setting out as a normal fee a percentage charge on revenue and a percentage charge on capital value.

7.9 Discretion should be given to the court to adjust the compensation claimed by both the Public Guardian and Trustee and private sector conservators on the basis of the amount deserved.

7.10 The conservator should be able to take his normal fees in monthly instalments or quarterly instalments.

V. Financial Statement: Passing of Accounts

The Committee believes that a standard financial statement should be developed to make review of property administration simple and thereby reduce the need for expensive and complicated passing of accounts procedures. Conservators and attorneys acting in place of a statutory conservator should, therefore, be required to prepare an annual financial statement showing assets, capital transactions, revenue transactions, expenditures and compensation claimed.

The Committee feels that this financial statement should meet three objectives:

1) simple and understandable to ordinary people;

2) allow the reader to determine and follow the assets and the management of capital;

3) reflect whether or not the person who is incapable is being maintained within his or her income, or whether capital is being depleted.

The Committee believes that at least a minimum of financial accounting should be provided to those who have a legitimate interest in the administration of the property of the person who is incapable. Notice should, therefore, be provided to appropriate persons that the financial statement is available on request. If the Public Guardian and Trustee is the conservator, notice should be received by the person who is incapable, by the person's guardian or attorney for personal care, and by those entitled to replace the Public Guardian and Trustee, so that they can decide if the Public Guardian and Trustee should be replaced. Where a private conservator prepares the document, those with a legitimate interest include the person who is incapable, the guardian or personal attorney, if any, of the person who is incapable, and the Public Guardian and Trustee.

Those with a legitimate concern about the administration of the property of a person who is incapable should be able to have the administration reviewed. This would involve the conservator passing his or her accounts. The procedure is expensive and time consuming, so that the threat of an application for a passing of accounts should be sufficient leverage to obtain detailed financial information from the conservator.

(Also see section 38 commentary.)

The Committee recommends:

7.11 A conservator should have a duty to prepare an annual financial statement showing:

-- the assets at the beginning of the year;
-- the assets at the end of the year;
-- capital receipts and disbursements;
-- revenue receipts and disbursements; and
-- compensation claimed.

7.12 Where the conservator is the Public Guardian and Trustee, notice of the availability on request of the financial statement should be given to the person who is incapable, his or her guardian or attorney for personal care, if any, and to the persons entitled to replace the Public Guardian and Trustee as statutory conservator.

7.13 Where there is a private conservator, notice of the availability on request of the financial statement should be given to the person who is incapable and to the guardian, or attorney for personal care, if any, of the person who is incapable, and to the Public Guardian and Trustee.

7.14 Conservators should be required to pass their accounts on order of the court.

THE PERSON

i) Age for Personal Decisions

The selection of an age at which the law confers rights always involves some element of arbitrariness. Whatever age is selected, some individuals in fact are sufficiently mature to exercise the right earlier, and others are not sufficiently mature. The threshold question is whether there is a need to specify a minimum age at which the rights and obligations associated with the part of the draft related to personal decisions should commence.

The Committee believes that there are good reasons for establishing the age at sixteen. The Child and Family Services Act and the Children's Law Reform Act provide for substitute decisions for those under sixteen. Parents have certain rights of substitute decision making for their children under sixteen, subject to the right of mature children to make their own choices. It would not be sensible for the Committee to create confusion regarding the law applicable to children.

Under the draft legislation, a sixteen-year-old who is mentally capable could by personal power of attorney select an attorney to act if incapacity arose; be subject to the substitute medical decision making provisions in the event of incapacity; and have a guardian appointed under the legislative provisions if incapacity were to warrant the appointment. An individual aged sixteen could be appointed by another to act as his or her attorney; could act as a substitute medical decider for a family member; and could be the guardian for another.

The Committee takes note of the changes that were made to the Mental Health Act removing the irrebuttable presumption of incapacity for those under the age of sixteen. While the Committee is satisfied that persons sixteen and over ought to have the same right to choose substitute deciders adults have, the Committee offers no opinion regarding the law as it applies to children under that age.

The Committee recommends:

8.0 Under the legislation, the age of sixteen should be the minimum age at which:

- -- an individual may appoint a personal attorney, or have a medical substitute decider or a guardian appointed under the legislation;
- -- an individual may be appointed as personal substitute decider or be appointed by the court as guardian for another.

ii) Persons Who are Mentally Incapable of Personal Care

The definition of "mentally incapable of personal care" is of more concern than that respecting property, because the rights associated with the person are so basic and fundamental. They range from everyday personal decisions about meals, brushing teeth and what clothes to wear to decisions involving life and death.

The approach chosen by the Committee is similar to that developed for defining "mentally incapable of managing property". It is based on the ability or inability to make a choice or to appreciate the consequences of a decision or lack of decision. Here, choices relate to health care, nutrition, shelter, clothing, personal hygiene and personal safety. The last area is included to deal with situations where persons who are mentally incapable are exploited or abused.

As with capacity to manage property, if a person has the ability to make choices or appreciate consequences with the assistance of others, the person is not incapable.

(Also see commentary accompanying Sections 41 and 6).

The Committee recommends:

9.0 A person is incapable of choice with respect to the necessities of life, and therefore, incapable of personal care, where the individual is unable to understand information that is relevant to making a decision about:

-- health care;
-- nutrition;
-- shelter;
-- clothing;
-- personal hygiene;
-- personal safety; or

is unable to appreciate the consequences of the decision, or lack of decision.

iii) Powers of Attorney for Personal Care

A. Creation of Power

Existing law permits individuals using powers of attorney to grant to others the power to make property decisions on their behalf. It does not permit the granting of a power to make personal care and medical treatment substitute decisions. Thus individuals are unable to arrange control of these areas of their lives in the event of their becoming mentally incapacitated. While there are dangers in the establishment of attorneys for personal care, the Committee believes that a system should exist whereby individuals can make provision for their mental incapacity. The grantor of the power should be able to create a power of attorney for personal care that authorizes another to make decisions in one or all areas in which he or she may become incapable. In combination with the continuing power of attorney for property, persons could make total preparations for their incapacity.

With the creation of powers of attorney for personal care, sufferers of Alzheimer's Disease, for example, could in the early stages of the disease determine their own future. They could indicate their preferences regarding how everyday personal care decisions should be made. With respect to medical and psychiatric treatment, the power could serve as what has become known as a "living will". The dignity of the individual would be maintained with minimal state involvement.

(See also commentary accompanying sections 42 and 43).

The Committee recommends:

10.0 Persons should have the right when mentally capable, by making a power of attorney for personal care, to grant to another, an attorney for personal care, the right to make for them those types of care decisions that they have set out in the power, if they become mentally incapable of making the decisions themselves.

B. Witnessing

Independent witnessing of the power of attorney for personal care is the first safeguard which would protect the grantor from potential restriction of future freedoms. The Committee recommends that the witnessing of a power of attorney for personal care should be identical to the witnessing of a continuing power of attorney over property. This entails the presence of two witnesses during the signing of the power. Again, persons who have a conflict of interest with the grantor should not be witnesses.

As with property, an attorney for personal care's authority stems only from the mental capacity of the grantor. It is therefore imperative that the person creating the power of attorney understands the nature and consequences of the document being signed. This can be achieved by requiring the witnesses to certify, in writing, that in their opinion, the grantor was mentally capable of personal care at the time the document was signed. These witnessing requirements should also apply during the revocation of a power of attorney for personal care. In both the creation and revocation of the power, they would serve to impress upon the witnesses the gravity of the situation and hopefully dissuade those who might consider abusing the power. Although these safeguards will cause inconvenience to grantors, they should not prevent the power of attorney for personal care from being a practical tool for the making of "authentic" substitute decisions. The Committee believes that unless there are strong reasons to the contrary, the witnessing and other functions governing powers of attorney for personal care should be the same as those for powers of attorney for property. The small benefit achieved by having different safeguards is not warranted if the ordinary person is confused and makes a mistake that makes the power of attorney inoperative.

(Also see section 44 commentary).

The Committee recommends:

10.1 The creation or revocation of a power of attorney for personal care, like the creation or revocation of a power of attorney for property, should require witnessing by two persons who are not the attorney, the attorney's family, the family of the grantor, an employee of a facility at which the grantor receives board or other personal cares or involved in litigation against the grantor.

10.2 To complete the witnessing requirements for creation or revocation of a power of attorney for personal care, the witnesses should be required to certify, in writing, that they are of the opinion that the grantor was mentally capable of personal care when the grantor signed the document.

C. Assessment of Grantor's Capacity

Unlike a continuing power of attorney over property, a power of attorney for personal care should only come into force after the grantor of the power is determined to be mentally incapable of personal care. Rights associated with the areas of personal care are so fundamentally personal that substitute decisions should only be made for those who are incapable of making them on their own or with assistance. Because the powers to be exercised by an attorney for personal care could be coercive, this safeguard is necessary to protect the grantor.

In addition to the witnessing requirements set out, the Committee feels that a requirement of a finding of the grantor's incapacity by two independent assessors to activate the power would help guard the grantor's freedom. At first the Committee felt that assessments should be conducted by professionals trained to perform such examinations. However, a power of attorney is a voluntary assignment of authority. Grantors should be able to name persons they trust to carry out the duty. If no such designations are made in the power, then two professionals authorized to make assessments should satisfy the requirement. These would be a physician and a second professional qualified to do an assessment of mental capacity who is a psychiatrist, psychologist, certified social worker or another physician.

Whoever performs the assessments should report their findings to the attorney. As well, copies of the reports should be served on the grantor, and an advocate should visit the grantor to ensure that he or she has as great an understanding of their significance as possible. The advocate should explain that the opportunity exists to oppose the process if the grantor has become unwilling.

Once these requirements are met, the attorney for personal care should file with the Public Guardian and Trustee a copy of the power of attorney for personal care, together with the assessment reports, a plan of guardianship and the advocate's confirmation of his or her visit. Provided that the advocate does not convey the grantor's objection to the process, the Public Guardian and Trustee should then validate the power, setting out the incapacities of personal care on which the reports coincided. Where the certificate is not issued and the attorney disputes the matter, the court should determine whether the power of attorney will take effect.

A similar process should be established for validating a power of attorney for personal care which names the Public Guardian and Trustee as attorney.

(Also see commentary accompanying sections 45 to 47).

The Committee recommends:

10.3 A power of attorney for personal care should authorize the attorney to make personal care decisions after the grantor of the power is independently assessed as mentally incapable of personal care and the appropriate documentation has been filed with the Public Guardian and Trustee.

10.4 The power of attorney for personal care should come into force where:

-- the attorney for personal care has filed with the Public Guardian and Trustee a copy of the power, the assessment of the mental incapacities for personal care of the grantor certified by at least two assessors designated by the grantor or otherwise by authorized professionals, a plan of guardianship and proof that a copy of the assessment has been explained to the grantor by an advocate experienced in working with persons of diminished mental capacity;

-- the Public Guardian and Trustee has not received from the grantor an objection to the activation of the power;

-- the Public Guardian and Trustee issues notice of the activation of the power.

iv) Consent to Medical and Psychiatric Treatment

D. Substitute Consent

Physicians can be held liable for battery or negligence if they provide treatment to those whose ability to give an informed consent to such treatment is impaired by mental infirmity. Although sections 50 and 51 of O.Reg. 865 under the Public Hospitals Act are relied upon, they do not protect doctors from liability for not obtaining informed consent to treatment. The regulation merely requires written consent from the person being treated or substitute consent from a parent, guardian or next of kin for surgical operations and specified diagnostic tests or medical treatment procedures performed in public hospitals.

In Ontario, statutory authority provides for substitute decisions with respect to treatment in limited circumstances. Under the Mental Health Act, a person who is specified in the Act may consent or refuse consent to psychiatric treatment for a person who is incapable. The Mental Incompetency Act gives authority to a court-appointed committee of the person to consent or refuse consent to treatment after the person has been declared mentally incompetent under the Act. But outside of these limited procedures the law of informed consent and the absence of uniform law providing for substitute decisions creates problems for both public hospitals and community-based programs regarding the care of persons who require medical treatment but lack the mental capacity to consent or refuse consent to treatment. The person might need a broken arm set, infected tonsils removed or dental surgery to alleviate pain or to correct a condition.

The Committee feels that substitute consent should be authorized by law. It recommends a substitute consent approach to medical and psychiatric treatment that would result in only controversial matters being taken to court. The approach would be expeditious, uncomplicated, and less expensive, disruptive and intrusive than a mandatory court application. It should protect doctors who comply with it from liability.

(Also see commentary preceding section 49.)

The Committee recommends:

11.0 Sections 50 and 51 of O. Reg. 865 under the Public Hospitals Act should be repealed. The provisions of the Mental Health Act regarding substitute consent for voluntary patients should be reconsidered in light of the following system of substitute consent to medical and psychiatric treatment.

11.1 Where a person is apparently mentally incapable of consenting or refusing consent to therapeutic medical or psychiatric treatment, the law should authorize certain others to make the decision on his or her behalf provided that the patient is not refusing the decision.

E. Who May Substitute Consent

A fundamental goal of the Committee is to promote the making of authentic substitute decisions for those incapable of making decisions for themselves. With respect to treatment decisions, it is felt that a court-appointed guardian or an attorney for personal care appointed by the patient should have the highest right to give or refuse substitute consent. The attorney, designated in a power of attorney for personal care, is most appropriate because he or she was selected by the grantor-patient to make such decisions.

In the absence of an attorney for personal care or guardian, the Committee feels that spouses, family members and friends should have priority to make substitute decisions about treatment. To ensure authenticity as much as possible, the spouse, family member or friend should certify the relationship and certain other facts: that there has been friendly personal contact with the patient over the preceding twelve-month period; that the person is willing to assume responsibility for the duties imposed on substitute deciders; and that the person knows of no conflict or objection from any other person in the list of equal or higher categories, and no objection from the patient him or herself, expressed when capable.

The Public Guardian and Trustee, as public safety net, should have authority to decide on behalf of the patient if there is no person who claims the authority to make the decision. The Public Guardian and Trustee should, where the treatment decision is not easy, make treatment decisions with the advice of experts.

(Also see section 50 commentary.)

The Committee recommends:

11.2 The highest priority to make a substitute decision for the patient should be a court-appointed guardian or an attorney for personal care designated by the patient, when capable, by a power of attorney for personal care.

11.3 The second priority should be such members of the family of the patient who have maintained friendly personal contact with him or her in the following order:

- -- a spouse;
- -- a child;
- -- a parent;
- -- a brother or sister;
- -- other next of kin;
- -- a friend.

11.4 Where there is no guardian, attorney for personal care, next of kin or friend willing and able to make a decision, the Public Guardian and Trustee should have authority to decide on behalf of the patient.

F. Patient's Refusal

There is a tendency when people are frail to want to find someone to make a substitute decision for them, even when they are mentally capable of making their own decisions. This occurs frequently with respect to patients' treatment decisions. Whether this practice is motivated by convenience or genuine concern for patients, it usurps control over their lives. All patients have the right to participate in their own treatment decisions. Accordingly, they should be treated with honesty and with respect for their dignity and autonomy.

Patients whom attending physicians feel are without capacity to consent should not thereby be denied an opportunity to participate in their treatment decisions. The Committee feels this should be ensured by having an advocate visit the patient in non-emergency situations. The advocate's function would be to explain to the patient that he or she is considered by the physician to be mentally incapable of giving or withholding consent to treatment and that a spouse, family member or friend has made a decision on his or her behalf. The advocate would also explain the patient's right to refuse the substitute decision.

A key role of the advocate should be to support the patient, provide neutral advice and speak on the patient's behalf. This, in many cases, could reduce the patient's fear about the situation being faced.

The Committee is of the view that further provision must be made for the situation when a patient believed to be incapable refuses to accept the substitute's decision. An independent assessment should be made of the patient's mental capacity to consent. A psychiatrist, or where there is none available, a physician, should do the assessment, and his or her written opinion should determine future steps. If capacity is found, the patient's decision must be respected. The reason for this result is the overriding presumption of capacity. Supported by an independent assessment, it is most unlikely that a court would find beyond reasonable doubt that the patient is incapable of giving or withholding consent to treatment. If incapacity is confirmed, the Public Guardian and Trustee should be informed for the purpose of making an application to court for the appointment of a guardian with authority to consent or refuse consent to treatment.

Concern has been expressed on behalf of physicians and other care givers that the judicial model for the appointing of a guardian may be too slow in cases of a refusal by a patient who is apparently incapable to accept a substitute's decision. The danger of delay has caused concern particularly in regards to the treatment of acute care patients in circumstances that may be urgent, but are not emergencies. Certainly, it would be improper to deny a patient the benefit, and health care professionals the ability to provide necessary therapeutic treatment to a person who is incapable, based only on the refusal. This would be intolerable to physicians and other health care providers with a duty to care for the sick.

These apprehensions about delay are understandable. However, there is every reason to believe that the judicial process is capable of the necessary response. As previously discussed, the Chief Judge of the District Court is confident that the court will be ready and willing to carry out the intentions of the legislation. If existing services prove inadequate, the Attorney General will consider the appointment of additional judges.

The earlier discussion (pages 61 and 63) also sets out the Committee's demand for an active Public Guardian and Trustee's office, one which is properly staffed and trained to bring applications quickly and effectively throughout the province. Inappropriate staffing resulting in inability to bring these matters quickly before the courts is not only improper, it is a false economy. The person's condition may suffer without treatment and increased health care costs may result. Delays in determining who has the right to make treatment decisions will result in unnecessary use of medical and hospital facilities.

If the government is not willing to properly staff the Public Guardian and Trustee's office, the health needs and human rights of persons who are mentally disadvantaged will not be adequately addressed.

Health care providers believe that even if the judicial system and the Public Guardian and Trustee are capable of meeting the needs of the vast majority of patients who are mentally incapable of making a health care decision and who refuse a treatment decision, there is one small group of patients that it is inappropriate to put through this sytem. There are patients whose state of incompetency is likely to be temporary in any event, but would pass much sooner after receiving treatment. These patients are delirious and are suffering as a result. Some Committee members believe that the delay caused by seeking a judicial order because of a refusal that does not relate to the decision about treatment is harmful to the patient.

Furthermore, they believe the cost involved in the process is also unnecessary, as the state of incompetency is transitory, and there are no other decisions a guardian would be required to make. Committee representatives from the Ontario Hospital Association, the Ontario Medical Association, and the Ministry of Health believe that the recommendations regarding patient refusal are more suited to chronic incompetency and long-term care situations.

(Also see commentary accompanying sections 51 and 52.)

The Committee recommends:

11.5 In a non-emergency situation, where the attending physician's opinion is that a patient is without capacity to consent, the patient should be visited by an advocate. The advocate should explain that the attending physician has found the patient without capacity to consent, that someone has claimed authority to give or refuse consent, the decision made by the person claiming authority and the patient's right to refuse the decision.

11.6 Where the patient refuses to accept the decision made by his or her family or the Public Guardian and Trustee, a second independent medical assessment of the patient's mental capacity to consent should be made. If the assessment shows that the patient is mentally capable, his or her own medical decision must be respected. Where the second assessment is that the patient is incapable, but the patient still refuses to accept a decision, the Public Guardian and Trustee should be notified to permit the office to apply to the court for the appointment of a guardian.

G. Emergency Treatment

The Committee believes that the above procedure for seeking substitute consent is inappropriate in cases of emergency, where the delay in obtaining substitute consent would endanger the life, a limb or a vital organ of the patient. A physician should be authorized to proceed with treatment without consent. The Committee feels that there exists a societal expectation that a physician must act to protect life, limb or vital organs in emergency situations.

Where the attending physician feels that a patient is without capacity to consent to treatment and proceeds to treat the patient because of an emergency situation, the Committee believes the physician should make a written statement indicating his or her belief that delay in the treatment caused by obtaining consent would endanger the life, a limb or a vital organ of the patient.

Where a patient refuses the proposed treatment, efforts that are reasonable in the circumstances should be made to obtain an independent opinion of a physician or psychiatrist to determine the issue of the patient's capacity. Where an independent opinion is obtained, treatment should only proceed if the opinion is that the patient is without capacity to consent.

Treatment should nevertheless proceed where, in the circumstances, it is not possible to obtain an independent opinion. Where an independent opinion cannot be obtained, the attending physician should make a written statement describing the efforts made and why an opinion was not obtained.

The Committee feels strongly that this emergency power should be reflective of existing law and the common law emergency doctrine. It should not be a wholesale authorization to treat. Treatment should be limited to that which is necessary to avert the crisis.

(Also see section 53 commentary.)

The Committee recommends:

11.7 The existing law with respect to emergencies should be retained. In an emergency, where the delay that would result from seeking consent or substitute consent would endanger the life, limb or vital organ of a patient who is apparently incapable of consenting or refusing consent, the attending physician should be authorized to provide treatment without consent to avert the crisis.

11.8 An attending physician who proceeds under these circumstances should make a written statement indicating that, in his or her opinion, delay in the treatment caused by obtaining consent would endanger the life, a limb or a vital organ of the patient.

11.9 In an emergency, where a patient refuses the proposed treatment, the attending physician should use all efforts that are reasonable in the circumstances to obtain the independent written opinion of a psychiatrist or another physician. Where an opinion is obtained, treatment should not proceed unless the opinion is that the patient is without capacity to consent. Where an opinion is not obtained, the attending physician should make a written statement describing the efforts that were made and why an opinion was not obtained.

H. Authority of Substitute

Certain types of treatment are so serious, irreversible or controversial that the law should not allow consent by a statutory substitute. In the absence of a health crisis, the Committee feels that before a substitute decision with respect to these matters is acceptable, the court should have to appoint a guardian and the guardian should have to prove the value of the treatment to this patient.

The Committee also believes that a substitute must be entitled to all relevant medical and psychological information concerning the patient. Otherwise, an informed, authentic decision would not be possible.

The Committee recommends:

11.10 The statutory substitute consent provisions should only apply to medical and psychiatric treatment, the intended effect of which is therapeutic, and for which a physician has responsibility.

11.11 The statutory substitute consent provisions to medical and psychiatric treatment should not apply to psychosurgery as defined in section 35 of the Mental Health Act, non-therapeutic sterilization, or a non-therapeutic experimental treatment or procedure.

11.12 A person making a substitute decision should be entitled to receive all the medical information about the patient and the treatment options to which the patient would be entitled in deciding for him or herself.

v) Court Appointment of Guardians

I. Appointment of a Guardian

Under the Mental Incompetency Act, a committee of the person (guardian) can be appointed where the court is satisfied beyond reasonable doubt that the person is mentally incompetent. However, the Act does not give guardianship much attention, and as a result there are virtually no legal precedents with respect to committeeship of the person.

The Committee feels strongly that an improved court appointment process should be implemented, so that individuals incapable of personal care, and who have not made provision for their mental incapacity by way of a power of attorney for personal care, can have a guardian appointed to make their personal care decisions.

As with the appointment of a conservator, proof of incapacity for personal care should not be enough to allow appointment by a court of a guardian. It should be necessary to prove the person needs guardian to make his or her personal care decisions. Anyone should be able to make an application to the District Court to be appointed, or have another appointed, as guardian. The Public Guardian and Trustee, as safety net, would make applications in cases of suspected abuse or neglect, or where no family or friends appear willing or able to become guardians for a person who is incapable.

The criminal law standard of proof beyond reasonable doubt now required under the Mental Incompetency Act should remain to establish that a person is mentally incapable of personal care, and that a guardian should be appointed. This safeguard would discourage unfounded applications and secure maximum protection of the rights of those who are subjects of such applications. Guardianship removes the fundamental right to self-determination. It should not be ordered easily.

An application for guardianship would be permitted even when an attorney for personal care is acting for a person pursuant to a personal power of attorney. This would allow those with concerns about the actions of the attorney for personal care to bring the matter to the court's attention for final determination.

The Committee recommends:

12.0 The court should be authorized to appoint a guardian for a person when satisfied beyond reasonable doubt that the person is mentally incapable of personal care and, as a result of the incapacity, he or she requires another who is authorized to make personal care decisions on his or her behalf.

J. Application for Guardianship

The Committee recommends that the same type of procedure for summary disposition that is available for the uncontested appointment of a conservator should apply to uncontested guardianship applications. The process ensures maximum opportunity for the person alleged to be incapable to oppose the process and have his or her voice heard but, at the same time, minimizes expenditure and unnecessary delay.

Service of the notice of application and accompanying documentation would mirror the conservatorship procedure. An advocate's visit to the person alleged to be mentally incapable would be required to explain the significance of the application and the right to oppose the process.

Consent of the proposed guardian to act, a plan of guardianship and the Public Guardian and Trustee's certificate approving of the plan and the proposed guardian, or a statement certifying that the Public Guardian and Trustee has not given a certificate, must accompany the notice of application.

Unlike the conservatorship process, a finding of incapacity must be based on the evidence provided by assessments made by at least two professionals. This would be in addition to a possible statement of opinion of people who know the person who is alleged to be incapable. One professional must be a physician. The other may be a psychiatrist, another physician, a registered psychologist or a certified social worker, who is qualified to do an assessment of mental capacity. Written statements in a form prescribed by the regulation, should be used by the professionals, avoiding the major cost of lawyer-prepared affidavits and providing standards for the reporting of medical and psychological assessments.

Provided the above requirements are met, and no objection is made by any one served with the application, the court should be authorized to deal with the application without the appearance of counsel and parties. This would be particularly appropriate in cases where a stroke, a degenerative disease or an accident has rendered an individual completely incapable of personal care and family or care providers need to have a responsible person making personal care decisions. Legal representation would not be required for this procedure.

Where the applicant could not provide the documentary evidence required for summary disposition or where an objection or appearance is delivered, the application would be dealt with at a trial or hearing provided for in the Rules of Practice.

(Also see commentary accompanying sections 55, 56 and 57.)

The Committee recommends:

12.1 There should be a procedure for summary disposition of an application to appoint a guardian. Where there is proof of incapacity for personal care and the resulting need for a guardian, and no objection to the appointment of the guardian, the court should be able to make an order without the appearance of parties or counsel being required. Contested applications and those not accompanied by professional mental assessments should be determined at a hearing with full representation or, when ordered, at trial.

K. Preferences

When an application is dealt with by the court at a regular hearing, the wishes of the person who is incapable should be taken into consideration in appointing a guardian. The aim is to produce substitute decisions that are as authentic as possible.

The Committee recommends:

12.2 Where an application for guardianship has not been accepted by all parties, the court should give special consideration to the wishes of the person who is incapable and the closeness of the relationship of the proposed guardian to the person.

L. Full or Partial Guardianship

One major weakness of the existing Mental Incompetency Act is that it does not recognize that an individual may be mentally capable of making some types of personal care decisions but incapable of making others. Mental incompetence is regarded for committeeship (guardianship) purposes as an all or nothing proposition.

In keeping with the fact that incapacities may be partial or may relate to all personal care functions, the Committee recommends two forms of guardianship, full and partial. To issue an order for full guardianship, the court must be satisfied that the person is incapable of personal care with respect to all personal care functions. The person would also require decisions which should be made by an authorized person as a result of these incapacities.

A full guardian should be empowered to make personal decisions on behalf of the person who is incapable in most areas of the person's life. These would include custodial, employment, educational, social, recreational, medical/ psychiatric and psychological (subject to specific limitations), and other health care decisions. A full guardian should be able to act as litigation guardian for the person, handle legal proceedings and have access to all information that would be available to the person if the person was mentally capable.

The Committee wants the legislation to recognize that a person who is incapable in one area need not be incapable in all areas of personal care. Therefore, partial guardianship should be ordered when a person is mentally incapable with respect to one or more but not all functions set out in the definition of "incapable of personal care". Powers conferred on the partial guardian by the court would, therefore, be one or more of those conferred on full guardians.

(See also commentary accompanying sections 60, 61 and 62)

The Committee recommends:

12.3 There should be an appointment of a full guardian where the court finds the person incapable with respect to all personal care functions, i.e., health care, nutrition, shelter, clothing, personal hygiene and personal safety.

12.4 A full guardian should be empowered to make custodial, most medical, psychiatric and psychological treatment decisions, other health care, social, educational and ordinary decisions that arise on a day-to-day basis.

12.5 A partial guardian would have only the limited authority conferred by the court to make substitute decisions with respect to the personal care decisions that the individual was found to be mentally incapable of making.

M. Extent and Limitations of Medical/Psychiatric and Psychological Services

Guardians with the authority to give or refuse consent should be able to consent to treatment whose intended effect is therapeutic. The Supreme Court of Canada in E.(Mrs.) v. Eve [1986] 2S.C.R.388, in deciding whether sterilization in the circumstances of the case was therapeutic, excluded from its concept of therapeutic treatment anything but that which is of direct benefit to an individual. This should apply to medical and psychiatric treatment for which a physician has responsibility and psychological treatment for which psychologist has responsibility.

The principle of intended effect being therapeutic should eliminate the possibility of substitute consent being used for improper purposes or for administrative convenience. Importantly, the principle does not unduly restrict professionals in their use and delivery of necessary and appropriate treatments and services.

The requirement that a medical or psychological treatment be the responsibility of a professional is a safeguard aimed at ensuring that treatments are appropriately used and properly provided. Professional standards, codes of ethics and disciplinary bodies govern the administration of treatment and the professionals who administer it. Negligence or improper intent can lead to lawsuits and disciplinary action. Professionals guilty of wrongdoing are also liable to be required by law to provide compensation.

The Committee believes that a guardian should not be empowered to make certain types of serious decisions unless the court has considered the proposed treatment or procedure and has granted the powers to a guardian. It also believes that there are some procedures or actions that no one should be permitted to authorize on behalf of a person who is mentally incapable.

This is consistent with the position taken by the Legislature of Ontario. The Human Tissue Gift Act prohibits gifts of human organs from persons, while they are living, who are not mentally capable of consenting. It was a deliberate decision of the Ontario Legislature that no substitute mechanism for consent should be provided in that legislation.

Thus, the courts, as noted above in the Eve case, and the Legislature of Ontario have been very conscious of the dangers involved in permitting anyone to make non-therapeutic decisions for a person who is incapable of giving his or her own informed consent.

Similar grave concerns arise with respect to the possible involvement of persons who are mentally incapable in scientific research or experimentation. By involvement, the Committee means any physical examination, giving of medication (or withholding of therapeutic medication) or performance of a procedure, carried out for the purpose of research or experimentation. By scientific research or experimentation, the Committee means that which involves an individual, but is not intended for the therapeutic benefit of that individual. Research or experimentation which is purely for the purpose of collecting information does not involve the individual.

The Committee believes it should be made abundantly clear in the legislation that a guardian with authority to give or refuse consent to therapeutic treatment should not have authority, thereby, to consent to the involvement of the person under guardianship in any scientific research or experimentation. However, the Committee believes that some scientific research or experimentation may be of such benefit to an individual or to classes of person who are mentally incapable and, at the same time, of such low risk to those involved, that an absolute bar should not be imposed. The court should be able to specificially authorize a guardian to consent to the participation of the person for whom he or she is responsible in a specific research project, or a specific experiment. The matter should not be one that can be dealt with without a hearing. A hearing of the matter would ensure that the right to life, liberty and security of the person under guardianship is enforced (s.7 of the Canadian Charter of Rights and Freedoms) and that any deprival of that right is made in accordance with the principles of fundamental justice. The judicial process would also ensure that the person under guardianship would have a right to equal protection and benefit of the law without discrimination on the basis of mental disability (s.15 of the Charter).

The court should not be limited in the type of scientific research or experimentation to which it may authorize a guardian to consent. Experimentation and research can take many forms. There will be many factors for a court to take into account in determining whether to authorize consent by a guardian. The absence of direct benefit to the person under guardianship should not be an automatic barrier to the participation of a person in a particular project.

The Committee is concerned that no special laws exist to regulate research and experimentation in universities, hospitals, by professionals working on their own, or in the private sector. The matter is one which should be studied by the government with a view to enacting general legislation.

Until regulatory standards are developed, the Committee feels strongly that caution should be exercised in the areas of human experimentation and research. Although specific laws are not in place, ethical guidelines exist in all Ontario universities having medical schools, and in most of the other universities. In addition, the Medical Research Council has guidelines, as do the Health Protection Branch of the Department of Health & Welfare and the Social Sciences and Humanities Research Council. Professional bodies such as the Canadian Medical Association, the Canadian Sociology and Anthropology Association and the Canadian Psychological Association have policies. To protect the integrity of persons who are mentally incapable, courts should only be able to approve scientific research or experimentation conducted under the auspices of in universities and hospitals having research ethics committees, where the committee has approved of the research experiment. These committees examine research proposals and grant approval only when they meet the established ethics guidelines. This safeguard provides some assurance that persons who are mentally incapable will not be exploited. Courts should not have authority to approve research by individuals or by entities in the private sector or by the government, which do not fall under these auspices.

The proposed legislation should provide guidance to the court in considering whether to approve of the participation of an individual in an experiment or research project. The court should not make an order unless it first considers the risks to the individual, the potential benefits to the individual and the potential effects of the procedure on the human dignity of the individual.

Aversive stimulation or conditioning is any procedure undertaken in the course of a program of behaviour management that is intended to result in the reduction of a behaviour after which it is applied. Psychologists use aversive conditioning with persons who are developmentally handicapped, as a means of correcting inappropriate behaviour. Sometimes, the behaviour can be so self-destructive that the individual will continue to physically harm himself or herself to the point of death. Strong therapeutic measures may have to be taken. Unenviable choices must be made which could include contingent restraint or confinement time out and rarely, the use of contingent electric shock. "Confinement time out" is a method of treating an undesirable behaviour. The person is removed from a situation and put in a space devoid of stimulation. "Contingent" means that the procedure's use is contingent on the occurrence of the negative behaviour. In other words, the procedure is only used in response to the behaviour.

Confinement is also necessary in some Alzheimers cases to prevent a patient from wandering off a premise unattended and getting lost or physically harmed.

The Committee feels that caution should be exercised in the authorization of these forms of treatment to protect against unacceptable violations of basic rights. Judicial authorization should be required for restraint, confinement or the use of contingent restraint, confinement or electric shock as aversive conditioning. In particular, a guardian should not be empowered to consent to a person's confinement by way of his or her admission to a psychiatric facility without a specific court order. Under no circumstances should restraint or confinement be authorized by the court, except as may be necessary to prevent bodily harm to the person, or to others.

The Committee believes that there are certain powers over a person who is incapable that it is unwise to give to another because it cannot be proven that their exercise is for the benefit of the person. No one should have authority to provide substitute consent for psychosurgery as defined and prohibited by the Mental Health Act. In the Eve case, the Supreme Court of Canada decided that non-therapeutic sterilization cannot be justified on the basis of being to the benefit of the person. The Committee notes that the House of Lords in Re B came to the opposite decision that it could be in the person's best interests. The Committee has decided that the Act should not provide for substitute consent for non-therapeutic sterilization.

The Committee also feels that the legislation should make it clear that there is no need for substitute consent where a caregiver is required to restrain or confine a person in his or her care in an emergency. The common law as codified by the Mental Health Act sets the conditions under which restraint can be utilized:

> "restraint" means place under control when necessary to prevent serious bodily harm to the patient or another person by the minimal use of

such force, mechanical means, or chemicals as is reasonable having regard to the physical and mental condition of the patient.

The Committee recommends:

12.6 The authority given a guardian to consent or refuse consent to medical and psychiatric services should apply to medical and psychiatric treatment for which a physician has responsibility and psychological treatment for which a psychologist has responsibility, provided that the intended effect of a treatment is therapeutic.

12.7 The authority of a guardian to consent or refuse consent to medical/psychiatric and psychological services should not apply to:

-- confinement as aversive conditioning;
- restraint as aversive conditioning;
-- electric shock as aversive conditioning; or
-- any medical/psychiatric or psychological service where the intended effect is not therapeutic

unless the court confers specific authorization regarding these treatments or procedures.

12.8 The court should not be able to give a guardian authority to consent to non-therapeutic sterilization or psychosurgery as defined by the Mental Health Act.

12.9 A guardian should not be able to authorize restraint or confinement unless the court has specifically conferred authority to do so. In particular, a guardian, without specifically conferred authority, should not be able to to consent to a person's admission to a psychiatric facility as defined in the Mental Health Act .

12.10 The authority to restrain or confine, if conferred on a guardian, should be exercised only to prevent bodily harm to the person or to another.

12.11 The common law duty requiring care givers to restrain or confine persons in an emergency to prevent serious bodily harm to them or to another person should be codified in the legislation.

12.12 A guardian should not have authority to consent to a person's involvement in a scientific research project or experiment that is not for the therapeutic benefit of the person unless the court confers authorization to consent to a specific scientific research project or experiment. No involvement should be authorized unless the scientific research project or experiment is conducted by personnel in a university or hospital whose research ethics committee has approved the research or experiment; the experimental procedure will not affect the human dignity of the individual; and the risks involved, if any, will be outweighed by the benefit to the person.

12.13 The topic of research projects and experimentation on human subjects should be studied by the government, with a view to enacting general legislation.

N. Temporary Guardianship

Temporary guardianship is necessary when a situation warrants urgent action and the usual court process is not immediate enough to meet the needs of the person who is incapable. It is envisaged that the Public Guardian and Trustee would most often utilize a temporary guardianship procedure when there is evidence that a person who is apparently incapable is at great risk of being neglected or abused and is not able to extricate him or herself from the situation.

In an application for temporary guardianship, notice should be provided to the person who is alleged to be incapable, but the court should have the power to dispense with notice because of the urgent nature of the situation. The standard of proof for proving mental incapacity should be proof on the balance of probabilities. In many cases, the need for prompt action would not allow the applicant to gather evidence to prove mental incapacity for personal care beyond reasonable doubt. To prevent serious harm to persons who are mentally incapable, the lower standard of proof is justified.

Temporary guardianship orders should not exceed 7 days where notice was not given to the person and 90 days where notice was given. Where mental incapacity will continue beyond the immediate crisis, the Public Guardian and Trustee or a family member or friend could apply for permanent guardianship.

Persons who are being abused or who are at risk of serious harm may need to be removed to places of safety, such as a public hospital. The court should have the authority to confer on the Public Guardian and Trustee as temporary guardian, power to enter on to property, using force if necessary, and where needed, to call upon a police officer to assist, to carry out the intent of the guardianship order.

As discussed with regard to the Public Guardian and Trustee's office (pages 61 to 63 and 147), the judicial model's effectiveness depends on a responsive judiciary and an active, properly staffed and trained Public Guardian and Trustee's office. Reference should be made to this earlier discussion and the Committee's belief that the court process will be sufficiently rapid to meet the needs of persons who are mentally incapable, applicants and other concerned individuals and professionals. Much will depend on the appropriate organization, funding and staffing of the office.

(See also section 64 commentary.)

The Committee recommends:

12.14 There should be provision for the Public Guardian and Trustee to apply to the court for temporary guardianship of a person apparently incapable of personal care where prompt action is necessary in respect of any matter seriously affecting the person. The court, on application, should be satisfied on the balance of probabilities of the incapacity and should grant only those powers necessary to prevent harm to the individual. The application should ordinarily require notice to the person who is allegedly incapable, but the court should have authority to dispense with notice in an emergency. The temporary guardianship should be limited to 7 days when brought without notice and 90 days with notice to the person.

12.15 Where it is satisfied that there is need to do so to protect the person under temporary guardianship, the court should have authority to confer on the Public Guardian and Trustee, as temporary guardian, power to enter on to property to take the person into custody, using force if necessary, and to call upon a police officer for assistance.

O. Termination of Guardianship

The termination procedure should mirror the originating procedure. Service should be provided to those with an interest in the application. Unless the application is brought by the person under guardianship, an advocate should explain to the person under guardianship the meaning of the application. Opinions may be given by at least one individual who knows the person and should be given by at least two professionals after an examination, that the person is mentally capable of personal care. Provided these conditions are met, the court should dispose of the matter without requiring the appearance of parties or counsel.

As with the application to terminate conservatorship, the standard of proof required to establish capacity should be proof on a balance of probabilities. The criminal standard protects fundamental rights of the person in the application to appoint a guardian, but would serve the opposite purpose in a termination application. Proof beyond reasonable doubt would be too onerous a standard and would violate the right of self-determination.

The Committee recommends:

12.16 There should be a procedure for summary disposition of an application for termination of guardianship without requiring the appearance of parties.

vi) Duties of Guardians, Attorneys for Personal Care and Medical Substitute Decision Makers

As with substitute decision makers for property, guardians, attorneys for personal care and medical substitute decision makers should be charged with specific statutory duties to prevent the abuse of powers and the neglect of obligations.

All substitutes making decisions with respect to the person should exercise their powers and perform their duties diligently and in good faith and wherever possible, make authentic decisions. Attorneys for personal care and guardians should be under duties to foster self-reliance and independence in the person who is incapable and to encourage the person to participate in decisions to the best of his or her abilities.

The Committee feels that the Public Guardian and Trustee should monitor the activities of personal care substitute decision makers. To achieve this, guardians and attorneys for personal care should file with the office an annual statement. The statement would inform the Public Guardian and Trustee of the whereabouts of the person who is incapable, significant health care and safety decisions that have been made on his or her behalf, decisions that were objected to by the person, and any proposals by the guardian for changes in the guardianship plan. An annual visit by an advocate to the person who is incapable should be reported. The visit is intended to ensure that the substitute is aware of programs to assist the person who is incapable and to provide some assurance to the public that those who are incapable and have substitute decision makers, are not being neglected or abused. As discussed in the Principles of Advocacy, advocates should have a right of access to visit a person who is incapable provided under the law.

The Committee reviewed the issue of liability of attorneys for personal care, guardians and medical substitute decision makers and has decided that persons should not be liable for their actions provided they acted in good faith in the execution or intended execution of their duties. The decisions to be made by these substitutes are serious. They are decisions few people will lightly take on as the performance of the required functions are a great responsibility. The added threat of liability would deter most if not all potential substitutes.

The Committee recommends:

13.0 Guardians, attorneys for personal care and medical substitute decision makers should be under duties:

- to exercise powers diligently, in good faith and for the benefit of the person who is incapable;
- to make decisions that there is reason to believe would be made by the person who is incapable, if capable, based on the intentions expressed when capable and the present wishes, and where this is not possible, to make decisions that promote the well-being of the person who is incapable;
- to encourage the person who is incapable to participate in decisions to the best of his or her abilities.

13.1 Guardians and attorneys for personal care should be under a duty to foster self-reliance and independence.

13.2 Each person having a guardian or attorney for personal care authorized to act under a power of attorney for personal care should receive an annual visit by an advocate to ensure that the guardian or attorney is aware of programs to assist the person who is incapable and to determine whether the person wishes to assert any of his or her rights under the Act.

13.3 A guardian or attorney for personal care authorized to act under a power of attorney for personal care should be required each year to report to the Public Guardian and Trustee:

-- the location of the person who is incapable;

-- decisions made on behalf of the person who is incapable to which the person objected;

-- health care and safety decisions made on behalf of the person who is incapable;

-- any proposals for changes in the guardianship plan;

-- whether an advocate has visited the person who is incapable.

13.4 No proceeding for damages should be commenced against a guardian, attorney for personal care or a person authorized to make a substitute medical or psychiatric treatment decisions for anything done or omitted in good faith in connection with his or her powers and duties under the legislation.

MISCELLANEOUS

Order for Assessment

In an application to appoint a conservator or guardian, or temporary conservator or guardian, or terminate an existing conservatorship or guardianship, the court may need additional evidence of a person's capacity. An examination may be ordered where there is reason to believe a person may be incapable.

The Committee believes that a court should be empowered to order one or more assessments for these purposes. Preference should be given to examinations in the individual's place of residence, so that the person is less inconvenienced and more at ease.

An enforcement order should be available where entry is refused, or where the order to appear in a designated place for examination is not complied with. The order would permit the assessment of those whose movement is controlled by family members or others. The ability to use an enforcement order might result in voluntary compliance with the court order for an examination.

An enforcement order would authorize the Public Guardian and Trustee and a peace officer to gain access to a person's residence, using force, if necessary, for the purpose of one or more assessments. The order should only be made if certain conditions are met: the person has failed or refused to comply with the order for examination; access has been denied by the person or others; efforts have been made to gain access, and no course of action is available that is less intrusive. These safeguards are included to prevent violations of civil liberties.

(Also see section 73 commentary.)

The Committee recommends:

14.0 Where there are reasonable grounds to believe that a person is mentally incapable, the court should be empowered to order professional assessments of the capacity of a person who is the subject of an application to appoint a conservator or guardian, a temporary conservator or guardian or to terminate a conservatorship or guardianship.

14.1 Preference should be given to conducting the examination in the person's place of residence.

14.2 The examination order should be authority for the place of examination to admit the person and facilitate the assessment, and for the person conducting the assessment to examine the person.

14.3 Where the court has ordered an assessment of a person, and it is established that:

- -- the person alleged to be incapable failed, or refused to comply with, the order for examination;
- -- access to the person who is allegedly incapable for conducting the assessment has been denied;
- -- all methods of gaining voluntary access, reasonable in the circumstances, have been tried; and
- -- no less intrusive method of gaining access is feasible

the court should be able to authorize the Public Guardian and Trustee, together with a peace officer, using force if necessary

-- to gain access for the purpose of the assessment;

-- to enter onto the premises;

-- to detain, remove and transport the person alleged to be incapable, if necessary, to a hospital or other place of safety for the purpose of performing the assessment.

IV DRAFT LEGISLATION AND COMMENTARY

BILL

Draft of an Act to provide for the making of Decisions on behalf of Adults Concerning the Management of their Property and concerning their Personal Care

CONTENTS

Section Page

1. Definitions 178
2. Least restrictive course of action preferred 179
3. Presumption of capacity 179
4. Counsel for person whose capacity is in issue 183

PART I

PROPERTY 185

5. Part applies to persons at least eighteen years old 185
6. Incapacity to manage property; 186

Powers of attorney for property 189

7. General power of attorney for property 189
8. Continuing power of attorney 190
9. Execution of continuing power 191
10. Termination of continuing power 193
11. Exercise of power after termination or invalidity 194

Statutory conservators 194

12. Public Guardian and Trustee as statutory conservator 194
13. Designation of preferred conservator 195
14. Professional assessment of capacity, with person's consent 196
15. Application to replace Public Guardian and Trustee 197
16. Review by court 200
17. Where statutory conservator ceases to act 200
18. Automatic termination 201

Section Page

Court-appointed conservators 202

19. Application for appointment 202
20. Service of notice 204
21. Accompanying documents 206

22. Summary disposition 209
23. Conservator 210
24. Order 211
25. Variation 211
26. Temporary conservator in urgent case 212
27. Application for termination 213
28. Service of notice 214
29. Evidence on application 216
30. Summary disposition 217

Property management 218

31. Authority of conservator 219
32. Duty of conservator 225
33. Liability of conservator 228
34. Attorney under continuing power 228
35. Guiding principles for expenditures 228
36. Application for directions 230
37. Compensation 230
38. Annual financial statement 233
39. Passing of accounts 235

PART II

THE PERSON 237

40. Part applies to persons at least sixteen years old 237
41. Incapacity for personal care 237

Powers of attorney for personal care 240

42. Power of attorney for personal care 240
43. Designation of preferred guardian 243
44. Execution of power of attorney for personal care 243
45. Application for validation 244
46. Validation if Public Guardian and Trustee is attorney 246
47. Assessment of grantor's capacity 247
48. Termination of power of attorney for personal care 248

Section Page

Consent to psychiatric and medical treatment 249

49. Definitions 253
50. Consent on person's behalf 253
51. Visit by advocate 260
52. Second opinion in certain cases 261
53. Emergency treatment 262

Court appointment of guardians 263

54. Application for appointment 263
55. Service of notice 264
56. Accompanying documents 266
57. Summary disposition 269
58. Guardian 270
59. Order 271
60. Full guardianship 272
61. Restraint or confinement to prevent serious bodily harm 278
62. Partial guardianship 279
63. Variation 280
64. Temporary guardian in urgent case 281
65. Application for termination 283
66. Service of notice 284
67. Statements of witnesses 285
68. Summary disposition 287

Duties of guardians and attorneys for personal care 288

69. Duty of guardian 288
70. Annual report 290
71. Change of person's residence 291
72. Attorney for personal care 291

PART III

MISCELLANEOUS 292

73. Order for examination 292
74. Statements as evidence 295
75. Mediation 296
76. Offences 296
77. Regulations 297
78. Commencement 297
79. Short title 297

1.-(1) In this Act,

"advocate" means a person who is a member of a prescribed class;

"capable" means mentally capable and "capacity" has a corresponding meaning;

"court" means the District Court of Ontario;

"dependant" means a person to whom another has an obligation to provide support;

"incapable" means mentally incapable and "incapacity" has a corresponding meaning;

"physician" means a legally qualified medical practitioner;

"prescribed" means prescribed by the regulations made under this Act;

"psychiatrist" means a physician who holds a specialist's certificate in psychiatry issued by The Royal College of Physicians and Surgeons of Canada;

"psychologist" means a registered psychologist as defined in the Psychologists Registration Act;

"social worker" means a person whom the Ontario College of Certified Social Workers has authorized to use the designation "Certified Social Worker";

"spouse" means a person of the opposite sex,

(a) to whom the person is married; or

(b) with whom the person is living in a conjugal relationship outside marriage, if the two persons,

(i) have cohabited for at least one year,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the Family Law Act, 1986.

Advocate:

In the draft legislation the "advocate" performs a rights advising role that must be completed before legal rights are affected. The prescribing of the class by regulation will permit certainty and also allow some flexibility to meet the needs of persons throughout the province.

Court:

The District Court of Ontario was selected because, at present, it is the only court available throughout the province that can have this jursdiction conferred on it under the Constitution. The Committee has read the recommendations in the Report of the Ontario Courts Inquiry,(1987) by the Honourable T.G. Zuber that, if implemented, would eliminate the District Court. The Committee has no opinion on whether the function is so like the historic superior court prerogative writ functions that it should be conferred on a new regional Superior Court, or, whether the function is more analogous to the protection of children now performed by the family division of the Provincial Court.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(2) When this Act requires that an advocate or other person explain a matter, the advocate or other person satisfies that requirement if he or she explains the matter to the best of his or her ability, whether the person receiving the explanation understands it or not.	Meaning of Explain: The function of the advocate is to explain rights to persons who there is some reason to believe may be incapable of understanding . There is concern that by requiring explanation, the legislation might be interpreted as requiring that the recipient understand. It is those who do not understand after the best explanation that the legislation is intended to benefit.	
2. When this Act authorizes a person to take action in respect of another's property or person, the person shall choose the least restrictive and intrusive course of action that is available and is appropriate in the particular case.	The Least Restrictive or Intrusive Action: This section is intended to provide guidance to judges in conferring powers with respect to guardianship and conservatorship, and to conservators, guardians and those consenting to psychiatric and medical treatment for another. The court should not confer powers on a guardian that are not warranted by the facts and thereby permit a greater restriction of freedom than is necessary. In the course of making a decision for another, the choice of action should be that which will least restrict the liberty of the person who is mentally incapable. In addition to its use as guidance, it can also be used by those applying to the court to replace a conservator or guardian. If the court is shown that actions taken by the substitute decider restricted or intruded into the life of the person who is mentally incapable more than was necessary, the court would have reason to appoint another.	
3.-(1) A person is presumed to be capable of entering into a contract and of giving consent. (2) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving consent.	Presumption of Capacity: There is a presumption, at common law, that a person is mentally competent or capable. There appears to be no precise meaning to the statement other than that the responsibility of proving that a person is not mentally capable lies on the person who alleges incapacity. From a practical point of view, society could not exist without individuals treating one another as though they were capable, in the absence of good reason to believe the contrary.	

Why does the draft attempt to give a clearer meaning to the presumption of capacity? The Human Rights Code, 1981, S.O. 1981, c.53, provides:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestory, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap.

2.(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestory, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status, handicap, or the receipt of public assistance.

3. Every person having legal capacity has a right to contract on equal terms, without discrimination, because of race, ancestory, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap.

4.(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestory, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

9. In Part I and in this Part,

(b) "because of handicap" means for the reason that the person has or has had, or is believed to have or have had, . . .

(ii) a condition of mental retardation or impairment,

(iii) a learning disability, or a dysfunction in one or more of the process involved in understanding or using symbols or spoken language, or

(iv) a mental disorder.

The proposed section supports the provisions of the Human Rights Code by requiring the service provider to presume the capacity of the person with whom he or she is dealing. For example, a hospital or doctor dealing with an elderly person would be entitled to rely on the presumption that the person was capable, unless facts came to light that established reasonable grounds for believing the person incapable of contracting or consenting to the proposed service.

It is intended that this provision reinforce the rights of persons who are mentally disadvantaged to obtain goods and services. It is further intended that those who provide the goods and services be legally protected when they accept individuals at face value without discriminating. This is not without its dangers. Persons who may be mentally incapable of understanding the essential duties involved in a service, for example, the use of a swimming pool, may be injured as a result of the presumption. Nevertheless, the Committee believes that it is better to err on the side of not interfering with individual liberty, than to be overprotective.

The presumption exists until the person contracting or providing service to an individual has reasonable grounds to believe that the person is without legal capacity. What do we mean by reasonable grounds to believe? If a person has a conservator of their property, the individual has been found incapable and the capacity to deal with that property resides with the conservator. Similarly, if a person has a guardian, those powers that have been conferred on the guardian are no longer those of the individual. Therefore, in respect to those matters where power has been conferred on a conservator or guardian, a person dealing with such an individual has reasonable grounds to believe that the person has no capacity. Beyond this, the matter remains one of fact. A person intending to enter a contract with another, who discovers that the other person does not understand the nature and consequences of the contract, has reasonable grounds to believe the person lacks legal capacity. Similarly, a health care professional, whose services require implied, oral or written consent, is entitled to rely on the presumption of capacity, until it is clear that the person to whom the service is being provided cannot understand the nature and consequences of the service.

The Committee believes that the basic value of self-determination requires this clarification of the law.

(3) In an action to set aside a contract entered into by a person while his or her property was under conservatorship or within six months before the creation of the conservatorship, the onus of proof that the defendant did not have reasonable grounds to believe that the person was incapable is on the defendant.

(4) Subsection (3) also applies, with necessary modifications, to an action to set aside a gift.

Contracts and Gifts:

A conservator makes property decisions on behalf and for the benefit of a person who is mentally incapable of making them him or herself. The conservator ensures that the person's needs are met and often must take strict control of property in order to protect the person from exhausting it. Incapable persons can be highly vulnerable to sales gimmicks and pressure tactics to donate to 'causes' and thereby victimized, making purchases they cannot afford or simply giving away money until it is gone. This can occur after conservatorship begins, but often takes place prior to the legal determination of incapacity.

This provision makes it easier to protect incapable persons from themselves and more importantly from others who take advantage of their incapacity. It does not, however, prevent service providers from relying on the presumption. Where a conservator or attorney under a durable power of attorney brings an action to void a contract or gift entered into or made by the incapable person, the party defending the contract or gift has the onus of proving that he or she did not have reasonable grounds to believe that the person was incapable. The onus also applies to contracts and gifts entered into or made within six months prior to the conservatorship but the benefit is lost for those beyond that period. The law of contract or gift is applicable in these actions.

Counsel for Persons Alleged to be Incapable:

A determination by a court of the mental incapacity of an individual is a very serious legal procedure. If the court determines that the person is mentally incapable of managing property and appoints a conservator, the individual loses his or her right to manage that property. A determination that a person is mentally incapable of personal care has even graver consequences. The powers that can be conferred by the court on a guardian may permit the guardian to decide many aspects of how the person who is incapable is to live. The vast preponderance of applications for conservatorship and guardianship are likely to be unopposed because the person subject to the application is mentally incapable of understanding the nature of the proceedings. The provisions of the draft are intended to ensure that only

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
4.-(1) In a proceeding under this Act in which a erson's capacity is in issue, (a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person;	appropriate persons apply for conservatorship or guardianship, that the plan of property management or the guardianship plan is suited to the needs of the individual, and that only powers that are needed in particular circumstances are given to the guardian. Where an application for conservatorship or guardianship is being contested, or where the court on reviewing the written materials becomes concerned, clause (a) would permit the court to direct that legal representation be provided for the person. The Public Guardian and Trustee would arrange for the legal representation. Of course, this does not mean that the person would lose the right to participate in the selection of counsel. Similar powers exist to direct legal representation where the court may appoint legal representation for a minor where there is a custody dispute.	
(b) the person shall be deemed to have capacity to retain and instruct counsel.	Clause (b) helps resolve for mental incapacity proceedings two major problems related to the legal representation of persons who are allegedly mentally incapable. The first is that under the existing law a litigation guardian, a person appointed to instruct legal counsel, can be appointed for them; the second, is that a lawyer may not take their case because there is a good chance that he or she will not be paid. The first problem arises because, in court proceedings, the plaintiff or defendant should be able to instruct legal counsel on how to proceed. If there is any doubt regarding a party's mental capacity, the court can be asked to appoint a litigation guardian. A litigation guardian is only appointed after the court has determined that the person lacks the mental capacity to instruct counsel. Rules 7.03, 7.04, 7.05, 7.06 and 7.07 of the Rules of Civil Procedure deal with the appointment, removal and duties of a litigation guardian. However, where the sole issue before a court is the mental capacity of the person, as in a guardianship or conservatorship application, no litigation guardian can properly be appointed since this appointment would predetermine the issue in question. For these persons, the deeming provision ensures essential representation to	

(2) If legal representation is provided for a erson in accordance with clause (1)(a) and no ertificate is issued under the Legal Aid Act in onnection with the proceeding, the person is esponsible for the legal fees.

challenge the removal of fundamental rights and freedoms. It is potentially problematic for counsel representing persons whom they feel lack the ability to give instructions, but a lawyer should provide the best service possible under the circumstances, acting on whatever instructions he/she is able to obtain.

The second problem relates to how the legal counsel acting for a person who is allegedly incapable is to collect his or her fees. In the existing situation, if a lawyer acts for a client, and the client is later found to be mentally incapable, the estate will sometimes refuse to pay the fees of the lawyer. Subsection (2) clarifies that the estate will have responsibility for legal fees to the extent of its assets. Application for a Legal Aid certificate may be made for a person for whom legal representation is provided. More important than the livelihood of the lawyer, is the fact that this state of law results in lawyers refusing to act for a person who is allegedly incapable. Just when the person needs counsel to protect themselves from losing control over their lives, the law makes it a gamble for the lawyer to act.

This is totally unsatisfactory. Whether or not the person is found incapable, the person should have a right to be represented. That representation should be paid for out of the assets, if any, of the person's estate. Several provisions of the Rules of Civil Procedure protect the conservator, the guardian and the estate. The Rules of Civil Procedure give the judge power to award costs on the proceeding. The bill of the lawyer can be assessed by an assessment officer to determine whether services billed were performed. The Report of the Ontario Courts Inquiry recommends (Recommendation 120) that the Solicitors Act be amended to spell out the principle that solicitor and client assessments of costs should reflect the value of work done. If this is done it would provide a further measure of protection of property.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
PART I PROPERTY	Several statutes now provide for substitute decision making for persons incapable of managing their own property. The Powers of Attorney Act enables a person to create a power of attorney that will survive his or her mental incapacity. Part III of the Mental Health Act establishes a procedure whereby a doctor can certify a person as incapable of managing property. There are two different procedures in the Mental Incompetency Act. The first, to declare a person mentally incompetent and confer powers of property management on a committee; the second, to permit a finding that the person is mentally incapable of managing his or her property, and to permit the court to appoint a person with the powers of a committee. This Part of the Draft contains powers of attorney provisions, the statutory conferring of the right to manage another's property (conservatorship) as a result of medical certification of mental incapacity under the Mental Health Act and pursuant to a non-coercive procedure, and the authority of the court to appoint a conservator for the property of another. Thus, the range of options for substitute decision making pertaining to property are found together. The property provisions are placed first, with some reluctance. Substitute decision making for the person has long been ignored. For this reason, it might as a policy matter be placed first. However, the statute is arranged in order of least to most intrusive. Decisions about property are less intrusive than those about the person.	
5.-(1) This Part applies to decisions on behalf of persons who are at least eighteen years old. (2) To exercise a power of decision under this Part on behalf of another person, a person must be at least eighteen years old.	Minimum Age for Substitute Property Decisions: Any age provision is arbitrary. The Committee has selected eighteen, the age of majority, as the age at which a person may make a power of attorney or designate a conservator, or act as another's attorney or conservator. While capacity to deal with property, like other capacities, develops differently from one individual to another, one of the most important aspect of property decisions is the right of innocent third persons to rely on the transactions. With few exceptions, the age of eighteen is regarded as the age at which to hold persons fully responsible for their property transactions. The Children's Law Reform Act provides for the appointment of a guardian of a minor's property.	

6. A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Mentally Incapable of Managing Property Defined:

The definition of "incapacity to manage property" and the corresponding definition of "incapacity for personal care" set out in section 41 are of crucial public concern. They are a statement of when others would be authorized to assume control of the property or personal decisions of an individual. They call for intensive public scrutiny. The Committee has attempted to develop an approach that is principled and justifiable.

The exercise of self-determination by an individual can result in choices that are quite dissimilar from those that might have been made by most other members of the community. The state should not permit the use of laws governing incapacity to manage property to remove the right to self-determination from an individual -- simply because the choices made by that individual are considered eccentric or even bizarre. The choice by an individual to renounce the ownership of property by giving away all his or her possessions must be respected, if that is his or her choice. The central issue in determining whether the law governing incapacity should permit intervention is whether or not a particular individual is capable of making a choice or decision. If the person is capable of making a choice, no interference with that choice should be permitted under the laws governing incapacity. Where, however, a person is incapable of making a choice and as a result will experience financial loss, serious sickness, injury or exploitation by others, the state, as protector of the rights of persons incapable of choosing, should provide for the authorization of others to make the necessary choices for that person.

It must be recognized that there are interests of the community that may be given legal priority over the right of an individual to self-determination. An example of this is the right of persons dependent on an individual for support. Family law legislation is designed to protect spouses and dependants of an individual from the failure of that individual to fulfill his or her legal obligations to them. Recognition of this is found in the Family Law Act, 1986, S.O., c.4, subsection 5(3), developed in response to Recommendation 1.(2) of the Interim Report on the Estates of Persons Incapable of Managing Their Property, August, 1985:

The Mental Incompetency Act, as amended

1. In this Act,

(*e*) "mentally incompetent person" means a person,

(i) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or

(ii) who is suffering from such a disorder of the mind,

that he requires care, supervision and control for his protection and the protection of his property;

39.—(1) The provisions of this Act relating to management and administration apply to every person not declared to be mentally incompetent with regard to whom it is proved, to the satisfaction of the court, that he is, through mental infirmity, arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs.

The Powers of Attorney Act, as amended

1. In this Act,

(*b*) "legal incapacity" means mental infirmity of such a nature as would, but for this Act, invalidate or terminate a power of attorney and "legal capacity" has a corresponding meaning. 1979, c. 107, s. 1.

The Mental Health Act, as amended

30.—(1) Forthwith upon the admission of a patient to a psychiatric facility, a physician shall examine the patient to determine whether or not he is competent to manage his estate.

> 5.(3) When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated, and there was no reasonable prospect that they would resume co-habitation.

The Committee believes that a demonstration of judgment resulting in financial loss or poor judgment should not alone be grounds for removing the legal capacity of a person to manage his or her own property. Higher standards should not be imposed on an allegedly incapable person than on those of us whose capacities are not in question. People make mistakes. Learning is, at least in part, profiting from our mistakes. Persons of diminished capacity should be free to make mistakes too. It is imperative that the test for incapacity should not be result-oriented, i.e., the central issue must always be whether a person has made a choice and not whether the results of that choice turned out to be satisfactory.

Our society believes that people are, or can be, morally responsible. Responsibility is used here in its sense of properly required to account. The concept of responsibility is based on two assumptions. First, that people know and understand what they do and the consequences that may arise therefrom and second, that it is appropriate that they bear the consequences of their actions.

The clearest example of the belief in responsibility is the criminal law. Society decides that an action is a threat to it and the state prohibits the action. It also provides penalties for doing the prohibited act. Where the state can prove that a person did the act, we expect that the person will bear the consequences. However, where it is established that the first assumption for a responsible act is not present -- that the person did not know the nature and consequences of the action -- we do not require that the person bear the penalty or consequences.

The belief that people are, or can be, responsible is fundamental to our society. It is the basis for the exercise of legal rights and the imposition of obligations upon persons. If a person is mentally capable, he or she can exercise legal rights and bear the consequences.

Where a person has been found mentally incapable of managing property, the law removes both the power to exercise legal rights and removes the obligations to bear the consequences.

The Committee believes that no test of capacity to manage property can be justified, other than whether a person can understand the nature of his or her actions or refusal to act and can appreciate the consequences of so acting, or refusing to act. The state should not permit interference with the powers of a person who meets this test of capacity.

The words "appreciate the reasonably foreseeable consequences" are based on the well-known concept of reasonable foreseeability, major features of both the law of negligence and contract. They are a short form for stating that a person need only foresee the consequences that can be foreseen by an ordinary person in similar circumstances. A person whose mental capacity is in issue need not live up to the standard of an expert with respect to a certain type of property.

With respect to assessing incapacity for purposes of the definition, the assistance of others in providing explanations to promote understanding is fundamental. We receive information via some sort of explanation and thus rely on explanation for understanding. Where a person accepts the assistance of another and is able to understand a concept that would not otherwise be understood, the person is capable. Certainly complex and even basic financial management is beyond the capacity of many people without assistance. People suddenly saddled with responsibilities for finances after the death of a spouse can be literally incapable of managing property without explanation from others. The mentally disadvantaged may have difficulty coping with what most regard as simple financial transactions, such as understanding a bank account. With assistance, however, many are capable of looking after their property.

In applying the definition, the acceptance of assistance by the person to understand information relevant to making a decision and to appreciate the consequences of the decision, is implicit in determining the person's capacity as defined as an ability to "understand" and "appreciate". It follows that a person who needs assistance to understand information or appreciate the consequences of a decision, but who rejects

POWERS OF ATTORNEY FOR PROPERTY

7.-(1) A person may give a written power of attorney for property, authorizing the person or persons named as attorneys to do on the grantor's behalf anything in respect of property that the grantor could do, except make a will.

(2) A power of attorney may name the Public Guardian and Trustee as attorney.

(3) A power of attorney is subject to the conditions that are contained in it.

(4) A power of attorney may be in the prescribed form.

help that is available, would be incapable of managing property. It also follows that if services providing such assistance do not exist, persons who would otherwise be able to control their own finances will have others appointed to manage their property. This underlies the critical need for supportive services.

General Power of Attorney for Property:

The provision is substantially similar to section 2 of the existing Powers of Attorney Act. The language has been clarified to use the term "attorney" instead of "donee" and "grantor" instead of "donor". It is clear that a power of attorney for property only governs property. Confusion has arisen with respect to the wording of the existing Powers of Attorney Act.

An attorney may not make a will for the person under conservatorship. The making of a will is a personal act and is not now and should not be delegated. The Succession Law Reform Act applies where no will is made by the person.

People may place conditions on the power of attorney, for example, that it is effective only during July 1987.

Subsection (4) does not require that a power of attorney, even a continuing power of attorney, be in the prescribed form, that is, the form set out in the regulations. The reason is that a power of attorney ought to reflect the intentions of its grantor and be as clear as possible. Under the existing law, a power of attorney clearly intended to continue after incapacity would be invalid if the words of the form are not used. To assist the public, a non-mandatory form can be prescribed.

The Powers of Attorney Act, as amended

2. A general power of attorney may be in Form 1 and is sufficient authority for the donee of the power or, where there is more than one donee, for the donees acting jointly or acting jointly and severally, as the case may be, to do on behalf of the donor anything that the donor can lawfully do by an attorney, subject to such conditions and restrictions, if any, as are contained therein. 1979, c. 107, s. 2.

COMMITTEE'S PROPOSED LEGISLATION

8.-(1) A power of attorney that expressly states that the authority given may be exercised during any subsequent incapacity of the grantor to manage property is a continuing power of attorney and remains valid despite the grantor's subsequent incapacity.

(2) A continuing power of attorney is subject to this Part, and to the conditions that are contained in the power of attorney and are consistent with this Act.

COMMENTARY

Continuing Power of Attorney:

Section 8 replaces sections 5 and 5a of the existing Powers of Attorney Act. Transitional provisions will be needed to ensure that powers of attorney executed under the Powers of Attorney Act are not invalidated, even though they do not comply with provisions contained in the proposed legislation.

Until 1979, a person was legally unable to create a power of attorney that would permit an attorney to act when the giver of the power, the grantor, lost the mental capacity to act. Simply put, when the grantor became mentally incapable, for example, of understanding his or her bills or banking transactions, the attorney could not legally continue to act.

Unlike earlier times, when family could and did act informally to support those who became mentally disabled, almost everyone today has some property or benefits that require actions to be taken on their behalf by someone with legal authority. Old age and other pensions, family benefits, and other social security measures require someone to perform legal transactions. The amounts involved may not be large but some activity, such as banking, must be done formally. Modern society creates demands for legal formality. Improvements in medical care have allowed more persons to live to old age, in both good health and bad.

In 1979, the Powers of Attorney Act was changed to permit a grantor to put a special provision in a power of attorney that would permit the attorney to continue to act after the grantor has become mentally incapable of acting. The provision did not permit the attorney to continue to act if the grantor was certified by a doctor as incapable of managing his or her property under the Mental Health Act. In that case, the Public Trustee, a public official, took over the management of the property.

In 1983, the Legislature, in response to demand from the community, once again changed the Powers of Attorney Act. This was the addition of section 5(a) to the Act. Now, by specifically providing, the grantor of the power can prevent the Public Trustee from becoming manager of the estate, as a result of the Mental Health Act. The draft provisions call a power of attorney intended to continue after the mental incapacity of the

EXISTING LAW

The Powers of Attorney Act, as amended

5. A provision in a power of attorney expressly stating that it may be exercised during any subsequent legal incapacity of the donor is valid and effectual, subject to such conditions and restrictions, if any, as are contained therein and not inconsistent with this Act. 1979, c. 107, s. 5.

5a.—(1) Where a provision referred to in section 5 is included in a power of attorney, the power of attorney may also include a provision as set out in Form 1 expressly excluding the operation of clauses 38 (1) (a) and (b) of the *Mental Health Act* in the event the donor is found not competent to manage his estate under that Act.

(2) Where a power of attorney containing a provision referred to in section 5 is in effect on the day the *Powers of Attorney Amendment Act, 1983* comes into force and the donor of the power has legal incapacity on the 1st day of January, 1984, the power of attorney shall be deemed to contain the provision referred to in subsection (1).

9.-(1) A continuing power of attorney shall be executed in the presence of two witnesses in the manner described in subsection (3).

(2) The following persons shall not be witnesses:

1. The attorney or his or her spouse.
2. The grantor's spouse.
3. A person who is related to the grantor or attorney by blood, adoption or marriage or whom the grantor or attorney has demonstrated a settled intention to treat as his or her child.
4. The owner, manager, agent or employee of a facility where the grantor is a boarder or receives other personal care.
5. A person who is a party to a proceeding to which the grantor is also a party.
6. A person whose property is under conservatorship or who has a guardian.

grantor a continuing power of attorney. If the grantor is certified as mentally incapable of managing property under the Mental Health Act, under the proposed provisions, his or her attorney may apply to continue to manage the property.

The benefit of continuing powers of attorney is that families can assist their members who become mentally incapable of managing their own property. The person who has fears of declining capacity to manage his or her property can make timely and appropriate arrangements. Safeguards can be placed on the power of attorney to meet the concerns that the grantor may have. A family member, business associate, professional, trust company or the Public Trustee can be appointed to manage the property when the person becomes mentally incapable. While the grantor retains mental capacity, he or she may continue to manage the property. The dignity of the individual is maintained. The state and its officials are not significantly involved.

Signing and Witnessing of a Continuing Power:

The Committee is concerned that a number of continuing powers appear to have been signed when the grantor is incapable of understanding the nature and consequences of the document. Most individuals who have created continuing powers of attorney do so when they fully appreciate the nature of their property and the effect of creating a continuing power. This does not always appear to be the case.

A number of continuing powers of attorney have been filed with the Public Trustee, where the power has been signed immediately before the purported grantor is medically certified at a psychiatric facility, as incapable of managing property. While situations in which a person is mentally capable on one day and medically certifiable as incapable of managing property the next are known to exist, the number of powers of attorney filed in these circumstances is suspiciously high. At law, no power of attorney exists where the person creating it does not understand the nature and consequences of the document being signed. It is difficult and costly to attack the legal validity of a continuing power of attorney.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(3) Each witness shall sign the document as witness and shall at the same time make a written statement in the prescribed form indicating that, in his or her opinion, at the time of executing the power the grantor was capable of managing property.	At present, the only formality required in creating a continuing power is that the signing be witnessed by a person who is not the attorney or the attorney's spouse. Since the attorney's authority stems solely from the capacity of the grantor, and because the consequences of creating a continuing power of attorney are so significant, it is desirable to increase the probability that a person signing a continuing power of attorney understands the nature and consequences of the act. The recommendations of the Committee are designed to safeguard the creation of continuing powers of attorney, without destroying their usefulness. The number of witnesses has been increased from one to two. The class of persons who cannot serve as witness to the document has been enlarged to eliminate the people who are the primary family of both the grantor and the attorney. Also eliminated are personal care givers such as staff of nursing homes and hospitals. While this will make it more difficult to find witnesses who know the mental capability of the grantor, it will reduce potential conflicts of interest. The witnessing is not complete until each witness signs and makes a written statement in the prescribed form indicating that the witness is of the opinion that when the grantor signed the power of attorney, the grantor was capable of managing property. The Committee believes that not all continuing powers of attorney signed under suspicious circumstances are the result of improper motives. Under existing law, in Part III of the Mental Health Act, once a person is medically certified as incapable of managing property, the Public Trustee takes over management of the property. In order for a spouse or close family member to properly take over from the Public Trustee, a costly court proceeding under the Mental Incompetency Act must be undertaken. To remedy this, the Committee has recommended that family members and close friends who are ready, willing and able to manage the property have a statutory right to take over management of the property from the Public Guardian and Trustee (See statutory conservator, s.15).	**The Powers of Attorney Act, as amended** 6. A power of attorney that contains a provision referred to in section 5 shall be executed in the presence of a witness who is not the attorney or the attorney's spouse. 1979, c. 107, s. 6.

COMMITTEE'S PROPOSED LEGISLATION

10.-(1) A continuing power of attorney is terminated,

(a) when the attorney dies, becomes incapable or resigns, if the power does not provide for the substitution of another person or if no such person is able and willing to act;

(b) when the Public Guardian and Trustee becomes statutory conservator under section 12 or 14, subject to section 15;

(c) when the court appoints a conservator under section 19;

(d) when the power is revoked.

(2) The revocation shall be in writing and shall be executed in the same way as a continuing power of attorney.

COMMENTARY

Termination of Continuing Power of Attorney:

A capable grantor may revoke the continuing power of attorney. The safeguards on the revocation are the same as for the creation of a continuing power of attorney. There must be two witnesses who indicate their opinion that the person revoking the power has mental capacity to manage property. The reason for this requirement is that a person creating a continuing power of attorney is contemplating a time when he or she is incapable of managing. The Committee believes, that a grantor who has created a continuing power of attorney should not be able to revoke that document when the grantor is incapable of directing his or her attention to the issue at hand. Therefore, the written revocation should be accompanied by the statement of a witness similar to that required of a witness to the creation of the continuing power of attorney. The requirement of witnessing and giving an opinion as to the mental capacity of the grantor who is revoking provides a more solid foundation for a continuing power of attorney.

The Committee is aware of the need to balance the protection of a grantor who is incapable against the need to retain continuing powers as a convenient device available to a person who is concerned about a future loss of capacity. If the creation and the revocation of a continuing power is made too difficult, the device will not meet the needs of the community. In attempting to devise the most appropriate safeguard, the Committee believes that requiring independent witnesses will cause sober second thought for those who might consider abusing continuing powers. The requirement of having a witness sign a statutory document should impress upon the witness the gravity of the situation. While it would be possible to establish other, or fewer, safeguards on the creation or revocation of continuing powers, the Committee believes that its recommendations would result in these powers remaining a practical tool, but remove some of the existing dangers to grantors.

A continuing power of attorney is also terminated where the court appoints a conservator under the conservatorship provisions, where the attorney dies, becomes incapable or resigns (subject to substitution), and where the Public Guardian and Trustee becomes statutory conservator after medical certification of

EXISTING LAW

The Powers of Attorney Act, as amended

7. A power of attorney that contains a provision referred to in section 5 may be revoked by the donor at any time while he has legal capacity. 1979, c. 107, s. 7.

8. A power of attorney that contains a provision referred to in section 5 becomes invalid and of no effect, notwithstanding such provision, where,

(*a*) an order has been made declaring the donor a mentally incompetent person and upon the appointment of a committee;

(*b*) an order has been made declaring the donor incapable of managing his affairs under section 39 of the *Mental Incompetency Act* and upon the appointment of a person having the powers of a committee;

(*c*) the Public Trustee becomes committee of the estate of the donor. 1979, c. 107, s. 8.

2.—(1) Clause 8 (c) of the said Act is amended by adding at the end thereof "unless the power of attorney also contains the provision referred to in section 5a".

(2) Section 8 of the said Act is amended by adding thereto the following subsection:

(2) A power of attorney that contains both the provisions referred to in sections 5 and 5a becomes invalid and of no effect upon the appointment of a committee of the estate of the donor by a court.

11. If a power of attorney is terminated or becomes invalid, any subsequent exercise of the power by the attorney is nevertheless valid as between the grantor or the grantor's estate and any person, including the attorney, who acted in good faith and without knowledge of the termination or invalidity.

STATUTORY CONSERVATORS

12. If a certificate is issued under the Mental Health Act certifying that a person who is a patient of a psychiatric facility as defined in that Act is incapable of managing property, the Public Guardian and Trustee is the person's statutory conservator.

incapacity to manage property under the Mental Health Act and under the proposed professional certification provisions. Section 15 would allow appropriate applicants to replace the Public Guardian and Trustee as statutory conservator, e.g. the attorney under a continuing power of attorney or family.

Exercise of Power After Termination:

This section is similar to section 3(1) of the Powers of Attorney Act as amended in 1986. At common law, the authority of an attorney is coincidental with the capacity of the grantor. When the capacity of the grantor ends through an event, e.g. death or legal incapacity, the actual authority of the agent ends, that is to say, the power of attorney is terminated. This provision protects attorneys and third parties acting in good faith and ignorance of the termination. The use of the words "becomes invalid" in addition to "terminated" (which includes the concept of "revocation"), assures banks who previously have been unwilling to accept continuing powers of attorney in statutory form, that the protection applies when a conservator is appointed by the court or when the power is revoked by the grantor or by operation of law.

STATUTORY CONSERVATOR

Under Part III of the Mental Health Act, a person who is registered in a psychiatric facility as a patient or outpatient may be certified by a physician to be "incompetent to manage his estate". When the certificate of incompetence is received by the Public Trustee, the person's civil right to manage his or her property is removed and the Public Trustee assumes the role of committee or manager of the property.

In the Committee's view it is important that the actual procedure whereby a physician certifies that a person is incapable of managing his or her property and gives notice of this fact to the Public Guardian and Trustee be retained in the Mental Health Act because it is the legal imposition of duties on physicians and others at these facilities. The Committee recommends that its application be limited to in-patients. Many patients arrive in a period of medical crisis. The medical certification of incapacity to manage protects the property of these persons, especially where immediate action is necessary to prevent financial loss.

The Powers of Attorney Act, as amended.

3.-(1) Where a power of attorney is terminated or revoked or becomes invalid, any subsequent exercise of the power by the attorney is valid and binding as between the donor or the estate of the donor and any person, including the attorney, who acted in good faith and without knowledge of the termination, revocation or invalidity.

The Mental Health Act, as amended

36.—(1) Forthwith upon the admission of a patient to a psychiatric facility, a physician shall examine the patient to determine whether or not he is competent to manage his estate.

(2) The attending physician may examine a patient and a physician may examine an out-patient at any time to determine whether or not the patient or out-patient is competent to manage his estate.

(3) After an examination under subsection (1) or (2), the physician or attending physician, as the case may be, shall enter his determination, together with written reasons therefor, in the clinical record prepared in respect of the patient.

(4) A physician or attending physician who performs an examination under subsection (1) or (2) and who is of the opinion that the patient or out-patient is not competent to manage his estate shall issue a certificate of incompetence in the prescribed form and the officer in charge shall transmit the certificate to the Public Trustee.

COMMITTEE'S PROPOSED LEGISLATION

13.-(1) A person may designate the person, including the Public Guardian and Trustee, whom the person wishes to be his or her statutory conservator or wishes the court to appoint as conservator in the event of his or her incapacity to manage property.

COMMENTARY

The review of the certificate of incapacity by the Review Board should remain in the Mental Health Act. Since this legislation governs the duties of doctors and other staff, it is appropriate that it be administered by the Ministry of Health. At present the civil effects of medical certification of incapacity to manage property are also set out in the Mental Health Act. Because these provisions form part of the range of mechanisms for substitute decision making with respect to property, the Committee feels they should be contained in the Substitute Decisions legislation.

The Committee recommends a change to the definition of "psychiatric facility" in the Mental Health Act's Regulations. Currently, most hospitals in Ontario are designated "psychiatric facilities". Regardless of why a patient enters a hospital or on what ward he or she receives service, the certification of incapacity to manage property process could technically take place provided that all of its safeguards are observed. The Committee feels that this is an unwarranted extension of a compulsory provision effecting fundamental civil rights. The Mental Health Act provisions should be limited to patients of psychiatric units of hospitals.

Designation of Conservator:

One principle underlying this report is that the law governing the management of property of persons who are incapable should permit capable individuals to exercise the maximum control possible over their lives and property. Some persons may be concerned about the use of a continuing power of attorney while they are capable. This provision would allow a person while capable to use the formalities of a continuing power of attorney (see section 9) to designate the person he or she wished to be statutory conservator or court appointed conservator in the event that he or she becomes incapable of managing

EXISTING LAW

(5) Where circumstances are such that the Public Trustee should immediately assume management of an estate, the officer in charge or, where the officer in charge is not present in the psychiatric facility, the physician or attending physician shall notify the Public Trustee in the fastest manner possible that a certificate of incompetence has been issued.

(6) A patient or out-patient may appoint the Public Trustee as committee of the estate of the patient or out-patient.

(7) An appointment under subsection (6),

(*a*) is not valid unless it is signed and sealed by the patient or out-patient; and

(*b*) may be revoked by a written revocation signed and sealed by the patient or out-patient.

(8) Where the Public Trustee is committee of the estate of a patient or out-patient at the time of his admission to or receipt in a psychiatric facility, a certificate of incompetence shall be deemed to have been issued and transmitted to the Public Trustee under subsection (4).

(9) Subsections (1) to (8) do not apply to a patient or out-patient whose estate is under committeeship under the ***Mental Incompetency Act***. 1978, c. 50, s. 13, ***part***.

38. The Public Trustee is committee of the estate of a patient or out-patient and shall assume management thereof,

(*a*) upon receipt of a certificate of incompetence;

(*b*) upon receipt of notice under subsection 36 (5);

(*c*) upon receipt of an appointment under subsection 36 (6), or

(*d*) upon receipt of a notice of continuance under section 41. 1978, c. 50, s. 13, *part*.

(2) The designation shall be in writing and shall be executed in the same way as a continuing power of attorney.

property. Like a continuing power of attorney, this designation would provide a means of dealing with property and affairs in the event of mental incapacity. Its advantage is that it would not give authority to deal with property until there was a finding of incapacity to manage property. This would also be its major drawback. It could not be used as a device for gradually turning over control of one person's affairs to another.

14.-(1) If a person's capacity to manage property is in issue, a psychiatrist, physician, psychologist or social worker may perform an assessment of the person's capacity.

(2) The assessment shall not be performed unless the person is first informed,

(a) of the purpose of the assessment;

(b) of the significance and effect of a certificate of incapacity; and

(c) of his or her right to refuse to be assessed.

(3) If the person who performs the assessment concludes that the person assessed is incapable of managing property, he or she may complete and sign a certificate of incapacity in the prescribed form.

(4) The person who performs the assessment shall ensure that copies of the certificate of incapacity are given to the Public Guardian and Trustee and to an advocate.

Statutory Conservatorship following Professional Assessment:

This provision establishes a non-coercive procedure for protecting the property of those who are in fact mentally incapable of managing their property. Where someone's mental capacity is in issue,regardless of where the person is located, the person can be asked if they will permit a professional assessment of capacity. The person must be informed of the purpose of the assessment, of the significance and effect of a certificate of incapacity and his or her right to refuse the assessment. If the assessment is not refused and if the assessment is that the person is incapable of managing property, the person is visited by an advocate who informs and advises the person of his or her right to prevent a statutory conservatorship from taking place. When the Public Guardian and Trustee receives notice from the advocate that a person does not refuse the conservatorship the Public Guardian and Trustee takes on the management of the person's property.

This non-coercive statutory conservatorship can be terminated by the giving of a direction to the Public Guardian and Trustee to end the conservatorship (see Par. 18(1)6). The conservator may also terminate the conservatorship by giving notice (see Para. 18(1)7). The provisions whereby family and friends who are suitable, and willing can take over the management from the Public Guardian and Trustee would apply to this form of statutory conservatorship.

It is expected that this procedure will be used to protect the property of persons who are mentally incapable in such care facilities as chronic care hospitals.

COMMITTEE'S PROPOSED LEGISLATION

(5) An advocate shall promptly visit the person to whom the certificate relates and shall,

- (a) notify the person of the certificate of incapacity;
- (b) explain the significance and effect of the certificate;
- (c) inform the person of his or her right to refuse the statutory conservatorship; and
- (d) ask the person whether he or she wishes to refuse the statutory conservatorship.

(6) The advocate shall promptly notify the Public Guardian and Trustee in writing that the visit took place and whether the person to whom the certificate applies refuses the statutory conservatorship.

(7) As soon as he or she receives the advocate's notification that the person does not refuse the statutory conservatorship, the Public Guardian and Trustee is the person's statutory conservator.

15.-(1) Any of the following persons may apply to the Public Guardian and Trustee to replace him or her as an incapable person's statutory conservator:

1. The attorney under the person's continuing power of attorney.
2. A person designated under section 13 as the person's preferred conservator.

COMMENTARY

Family Members as Statutory Conservator:

As noted earlier, under existing law only the Public Trustee can manage the property where a patient is medically certified under the Mental Health Act as unable to manage property. A spouse or family member who has shared the responsibility of management with the incapable person is not entitled to manage the property, unless there is a continuing power of attorney appointing the relative as the incapable person's attorney or the family member applies to the courts and is appointed committee of the incapable person's estate. This court process costs several thousand dollars. This provision is designed to eliminate the need for court applications where no contentious issues exist. It creates an inexpensive, expeditious process to replace the Public Guardian and Trustee as statutory conservator.

EXISTING LAW

1. Section 38 of the *Mental Health Act*, being chapter 262 of the Revised Statutes of Ontario, 1980, is amended by adding thereto the following subsections:

(2) Where the donee of a power of attorney that contains a provision referred to in section 5a of the *Powers of Attorney Act* satisfies the Public Trustee of the existence of the power and notifies the Public Trustee of the donee's intention to manage all the estate by means of the power of attorney, the committeeship of the Public Trustee under clauses (1) (a) and (b) is excluded or terminated.

(3) Where the committeeship of the Public Trustee under clauses (1) (a) and (b) is excluded or terminated under subsection (2), the Supreme Court may, at any time upon the application of the Public Trustee, appoint him as committee of the estate of the donor of the power of attorney with all or any of the rights and powers conferred upon him by this Act with regard to the management of estates.

'(2) If no application has been made under subsection (1), any of the following persons may apply to the Public Guardian and Trustee to replace him or her as the person's statutory conservator:

1. The person's spouse, child, parent, brother or sister.
2. The person's friend.

(3) The application shall be in the prescribed form and shall be accompanied by a management plan for the property in the prescribed form.

(4) The application shall contain a statement indicating that the applicant has been in personal contact with the incapable person during the preceding twelve month period, that their relationship is friendly and that the applicant is willing to perform all duties in respect of the incapable person's property.

The most appropriate replacement for the Public Guardian and Trustee is an attorney under a continuing power of attorney or a person designated to be statutory conservator by the incapable person. Such an applicant would have priority over other potential applicants. Where no application is made by an attorney or designated statutory conservator, a spouse or family member who has been in personal contract with the incapable person over the preceding twelve-month period, or a friend of the incapable person, should be able to make an application. This personal contact in a relationship of mutual trust and affection promotes "authentic" substitute decisions. It precludes estranged spouses or family and friends who may not be aware of the person's recent viewpoints and lifestyle. The inclusion of friends is seen as important and necessary. The Committee envisages people who live with or are very close to the incapable person, and who, in many cases, know them best. The provision also would allow two or more applicants to act jointly or each to be statutory conservator for part of the property.

The Committee feels that the Public Guardian and Trustee should play a vital role in the screening of applicants and also have an ongoing supervisory role with respect to statutory conservators. While the Public Guardian and Trustee cannot be given a judicial role in screening, the Public Guardian and Trustee should be able to act if an inappropriate person wants to become statutory conservator. When the Public Guardian and Trustee believes that an applicant is inappropriate to be conservator, for example, where the plan of management is unsatisfactory, and the applicant persists, the Public Guardian and Trustee must apply to the court for the directions as to who should be conservator.

As a practical matter, the ability of the Public Guardian and Trustee to apply to the court for a determination would screen cut unrealistic applications. It is likely that a few persons would persist in seeking to be conservator when they face a contentious application. Of course, the Public Guardian and Trustee would not apply to the court unless there was a strong likelihood that the court would not appoint the particular applicant as conservator. Pending the judicial determination, the Public Guardian and Trustee would remain statutory conservator.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(5) An application by an applicant described in subsection (2) (relative or friend) shall be accompanied by a surety bond for the value of the property. (6) The court may, on application, order that the requirement for a surety bond be dispensed with or that the amount required be reduced, and may make its order subject to conditions.	As at present, under the Mental Incompetency Act, a conservator or statutory conservator should be required to post a bond equal to the value of the estate to guarantee that the estate will be managed properly. Attorneys and designated statutory conservators should be exempted because they were selected by the incapable person while capable. The court, on application, should be empowered to reduce the bond or to order that no bond is required.	
(7) If the Public Guardian and Trustee is satisfied that the applicant is suitable to manage the property and that the management plan is appropriate, the Public Guardian and Trustee shall certify that the applicant is statutory conservator in his or her place and has power to act as such. (8) The Public Guardian and Trustee may certify that two or more applicants are joint statutory conservators, or that each of them is statutory conservator for a specified part of the property. (9) A person who replaces the Public Guardian and Trustee as statutory conservator shall administer the property in accordance with the management plan, subject to any conditions imposed by the court.	When the Public Guardian and Trustee turns over the statutory conservatorship to the family member, subsection (7) provides for the issuance of a certificate, so that the statutory conservator can prove his or her authority to act. The statutory conservator would be under the same duties as a court appointed conservator and have the same powers.	

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
16.-(1) If the Public Guardian and Trustee refuses to issue a certificate for a statutory conservator under subsection 15(7) and the applicant disputes the refusal, the Public Guardian and Trustee shall apply to the court to decide the matter. (2) The court shall decide whether the applicant should, in the circumstances, replace the Public Guardian and Trustee. (3) In the case of a dispute by an applicant described in subsection 15(2) (relative or friend), the court shall also take into consideration the incapable person's wishes and the closeness of the applicant's personal relationship to the person. (4) The court may, in its order, impose such conditions on the conservator's powers as it considers appropriate.	Determination of Statutory Conservator by Court: This provision allows the Public Guardian and Trustee to apply to the court when the Public Guardian and Trustee is not satisfied that the applicant is suitable and available to manage the property of the incapable person, the plan of management is inappropriate or when there is more than one suitable applicant who does not wish to act jointly. Where an attorney or designated statutory conservator disputes the Public Guardian and Trustee's refusal to issue a certificate, the court would weigh heavily the person who is incapable's choice of the individual in the power of attorney or designating document. If the refusal pertains to a spouse, family member or friend, subsection (3) requires the court to consider the wishes of the person who is incapable and the closeness of the person's relationship with the applicant. Again, the Committee feels this would promote "authentic" substitute decision making.	
17.-(1) If a statutory conservator ceases to act as such for any reason, the Public Guardian and Trustee may act as the incapable person's statutory conservator until a new application under section 15 (application to Public Guardian and Trustee) or an application under section 19 (court application) has been disposed of.	Where Statutory Conservator Ceases to Act: There are many possible reasons for a person who has replaced the Public Guardian and Trustee to cease to act as statutory conservator. Ill health and removal from the province are but two. This provision prevents a person being left without a property manager by authorizing the Public Guardian and Trustee to act in the capacity of statutory conservator until an appropriate replacement applies.	

(2) The Public Guardian and Trustee shall act as nservator if he or she is satisfied that it is cessary to do so in order to prevent harm.

18.-(1) A statutory conservatorship is minated by the following events:

1. Notice to the conservator under section 40 of the Mental Health Act that the certificate of incapacity to manage property has been cancelled.
2. Notice to the conservator that the patient has been discharged, unless the conservator has also received a notice of continuance under subsection 41(2) of the Mental Health Act.
3. The expiration of six months after the patient's discharge, if a notice of continuance has been given.
4. The expiration of the time for an appeal from a decision by the review board under the Mental Health Act that the person is capable of managing property, if no appeal is taken, or if an appeal is taken, its final disposition.
5. The appointment of a conservator by the court under section 19.
6. Subject to subsections (2) and (3), in the case of a statutory conservatorship created under section 14 (professional assessment), notice by the person under conservatorship to the conservator that the conservatorship is terminated.
7. In the case of a statutory conservatorship created under section 14 (professional assessment), notice by the conservator to the person under conservatorship and to the Public Guardian and Trustee that the conservatorship is terminated.

Subsection 2 requires the Public Guardian and Trustee to act as conservator where action is necessary to prevent harm.

Termination:

These are the ways that a statutory conservatorship can be terminated. All appointments of a conservator by the court should terminate a statutory conservatorship. This makes a court application for the appointment of a conservator a means of reviewing the appropriateness of any statutory conservatorship.

The Committee believes that the provisions under the Mental Health Act for terminating the certificate of incapacity and the subsequent involvement of the Public Guardian and Trustee are appropriate in principle. This means that a statutory conservatorship would terminate and a statutory conservator would relinquish management upon the cancellation of the certificate of incapacity by a physician, the discharge of the patient from a psychiatric facility where no notice of continuance is issued or the expiration of six months after discharge where a continuance was issued. Where the review board or the court has determined that a person is capable of managing, the conservatorship would expire at the end of the time to appeal the decision. Subsection (4) provides that where a person other than the Public Guardian and Trustee is statutory conservator, the Public Guardian and Trustee should be required to inform that person of the termination.

Paragraph 6 and 7 permit a person who has a conservator as a result of the non-coercive professional certification process and his or her conservator to terminate by notice to each other.

The Mental Health Act, as amended

42. The Public Trustee ceases to be committee of the estate of a patient or out-patient and shall relinquish management therof,

(*a*) upon receipt of notice of cancellation of the certificate of incompetence of the patient or out-patient;

(*b*) upon receipt of a revocation in writing, signed and sealed by the patient or out-patient, of an appointment referred to in subsection 36 (6);

(*ba*) upon receipt of satisfactory evidence of a power of attorney that contains the provisions referred to in sections 5 and 5a of the *Powers of Attorney Act* and the notice referred to in subsection 38(2).

(*c*) upon receipt of notice of discharge of the patient or out-patient, unless he has at that time received a notice of continuance; or

(*d*) upon the expiration of six months after the discharge of the patient or out-patient, where a notice of continuance was received. 1978, c. 50, s. 13, *part*.

(2) When the conservator receives the notice ferred to in paragraph 6 of subsection (1), he or e shall cause an advocate to visit the person who ve the notice.

(3) The conservatorship is not terminated until e advocate makes a statement in writing to the blic Guardian and Trustee certifying that he or e has visited the person who gave the notice, has plained its significance and is satisfied that e person wishes to terminate the conservatorship.

(4) If the Public Guardian and Trustee receives notice concerning a statutory conservatorship though he or she is not the statutory nservator, he or she shall ensure that it is omptly forwarded to the conservator.

COURT-APPOINTED CONSERVATORS

19.-(1) The court may, on any person's lication, appoint a conservator for a person who incapable of managing property and, as a result, ds decisions to be made on his or her behalf by erson who is authorized to do so.

(2) An application may be made under subsection even though there is a statutory conservator.

Subsections (2) and (3) are intended to protect the person under conservatorship who has given notice of termination, by sending an advocate to visit him or her to ensure that the significance of the notice is understood and that the person really wishes to terminate. This is designed to prevent exploitation of those under conservatorship.

Who May Apply:

The provision states that any person may make an application to the court to have a conservator of property appointed for a person who is mentally incapable. The Committee considered and rejected a list of persons who might have a legitimate interest in having a conservator appointed. It concluded that the creation of a list of interests would result in the same effect as permitting anyone to make the application.

Subsection (2) clarifies that an application for a court appointed conservator may be made even though there is an acting statutory conservator. This approach gives the court ultimate control over substitute decision making with respect to the property of an incapable person. If someone is concerned that a statutory conservator or an attorney is dealing inappropriately with the property of a person who is mentally incapable, the application can be brought. It is likely that it would be combined with an application for an accounting by the statutory conservator or attorney.

35. Subsection 7 (2) of the *Mental Incompetency Act*, being chapter 264 of the Revised Statutes of Ontario, 1980, is repealed and the following substituted therefor:

(2) The application may be made by,

(a) the Attorney General;

(b) any one or more of the next of kin of the alleged mentally incompetent person;

(c) the person to whom the alleged mentally incompetent person is married;

(d) the person of the opposite sex with whom the alleged mentally incompetent person is living in a conjugal relationship outside marriage;

(e) a creditor; or

(f) any other person.

COMMITTEE'S PROPOSED LEGISLATION

(3) The standard of proof that a person is ncapable of managing property and, as a result, eeds decisions to be made on his or her behalf by person who is authorized to do so, is proof eyond a reasonable doubt.

COMMENTARY

Standard of Proof as to Capacity:

The right to self determination is fundamental. While in some circumstances it will be necessary to provide a substitute decision maker for a person who is incapable of managing his or her own property, it should not be easy to remove control of an individual's property from him or her. As noted earlier, section 3 provides for a presumption of capacity to contract and to consent to services requiring consent. The existing Mental Incompetency Act appears to have two different standards of proof. In an application for a declaration of mental incompetency, subsection 7(1) of the Mental Incompetency Act requires proof beyond reasonable doubt that the person is mentally incompetent. Under section 39 of the same, where the application is to determine that a person is incapable of managing his affairs, that fact must only be proven on the balance of probabilities. In court proceedings to appoint a conservator the criminal code standard of proof beyond reasonable doubt is a good safeguard of the fundamental right to self-determination.

Before appointing a conservator, the court must be without reasonable doubt that the person is mentally incapable of managing his property; and as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.

Need for a Process for Summary Disposition:

Fundamental justice demands that an individual who may have his or her right to manage property removed should have a right to be heard. However, there are many cases where a stroke, a degenerative disease, or an accident has rendered an individual completely incapable of managing property. The problem for the family is one of taking care of property transactions. In these cases, the Committee feels that an application should be available that can result in the expeditious appointment of a conservator without needless expenditure. This process must protect the property and civil rights of the person alleged to be incapable of managing.

EXISTING LAW

The Mental Incompetency Act, as amended

7.—(1) The court upon application supported by evidence may by order declare a person a mentally incompetent person if the court is satisfied that the evidence establishes beyond reasonable doubt that he is a mentally incompetent person. R.S.O. 1970, c. 271, s. 7 (1).

39.—(1) The provisions of this Act relating to management and administration apply to every person not declared to be mentally incompetent with regard to whom it is proved, to the satisfaction of the court, that he is, through mental infirmity, arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs.

(2) This section applies although the person is not a mentally incompetent person.

(3) Such of the powers of this Act as are made exercisable by the committee of the estate under order of the court shall be exercised in the cases provided for by subsection (1) by such person, in such manner, and with or without security, as the court may direct, and any such order may confer upon the person therein named authority to do any specified act or exercise any specified power, or may confer a general authority to exercise on behalf of the person to whom the order relates until further order, all or any such powers without further application to the court.

(4) Every person appointed to do any such act or exercise any such power is subject to the jurisdiction and authority of the court as if such person were the committee of the estate of a mentally incompetent person so declared.

20.-(1) Notice of an application to appoint a conservator shall be served, together with the documents described in subsections 21(1) and (2),

(a) on the person alleged to be incapable of managing property;

(b) on the Public Guardian and Trustee;

(c) on the proposed conservator;

(d) on the following persons, if known:

1. The guardian of the person alleged to be incapable.
2. The person's attorney for personal care.
3. The attorney under the person's continuing power of attorney.
4. The preferred conservator designated by the person under section 13.

The lack of an inexpensive method for permitting a responsible person to manage the property of persons who are mentally incapable and who have assets of only moderate value, leads to the distorted use of other legal devices. Family members may, with the best of intentions, have powers of attorney signed by persons who are no longer capable of understanding the nature of the power of attorney or appreciating its consequences. Medical certification under the Mental Health Act of incapacity to manage property is being used when the person certified has no real connection with a psychiatric facility. If appropriate procedures are not available, members of the community, often with good intentions and often at some legal risk to themselves, will adopt what appears to be the best practical choice. The danger is that the rights and liberties of individuals will not be adequately protected. Not all persons using legally inappropriate methods to have the capacity of a person to manage his or her own property removed are well intentioned. Therefore, the Committee has developed an approach that is both cost-effective and protective of legal rights.

Notice of Application:

Notice of the application must be served on the allegedly incapable person, the Public Guardian and Trustee, the proposed conservator, a guardian, an attorney for personal care, an attorney under a continuing power of attorney or a preferred conservator designated by the person who is alleged to be incapable, if they are known.

COMMITTEE'S PROPOSED LEGISLATION

(2) The notice and accompanying documents need not be served on the applicant.

(3) The notice and accompanying documents shall also be served on at least two of the following persons, by ordinary mail sent to their last known address, in accordance with subsection (4):

1. The spouse of the person alleged to be incapable and the person's children who are at least eighteen years old.
2. The person's parents.
3. The person's brothers and sisters who are at least eighteen years old.
4. The person's friends who are at least eighteen years old and have been in personal contact with him or her during the preceding twelve months.

(4) All the persons described in paragraph 1 of subsection (3) who are known shall be served, and if fewer than two persons described in that paragraph are served, all the persons described in the next paragraph who are known shall be served, and so on until at least two persons have been served.

(5) The parties to the application are the applicant and the persons served under clauses (1)(a), (b), (c) and (d).

(6) A person described in clause (1)(d) who was not served, or a person described in subsection (3), whether served with notice of the application or not, is entitled to be added as a party at any stage in the proceeding if he or she serves a

COMMENTARY

At least two persons who are most closely related to the person, and who, therefore, have an interest in the application must be served by ordinary mail. Those listed in the first paragraph must all be served. If no two are found or are reasonably available, those in the next paragraph must be served. Service continues in each succeeding paragraph until at least two persons have been served after attempts are made to serve the entire paragraph. The reason for service of the entire paragraph is to avoid applicants choosing to serve specific persons in a class, such as siblings sympathetic to the application, and neglecting others who have an equal right to receive notice of the application.

The purpose of the notice is to give these persons the opportunity to oppose the application, provide evidence or to demand a hearing. This opportunity, for example, would allow these persons to ask the court to appoint a conservator who would be more appropriate than the person proposed in the application.

Parties:

Parties to an application are those who in subsection (1). Parties can also be held responsible for costs. Therefore, subsection (5) is designed to eliminate unnecessary parties. Subsection (6) permits all those in subsection (3), whether or not served, and those in clause (1)(d) who have not been served, who may have concerns about the person alleged to be incapable, to add themselves as parties. To be added, a person must file a notice of appearance along with proof of service of the notice on those served under subsection (1).

EXISTING LAW

notice of appearance on every person who was served under subsection (1) and files it with proof of service.

(7) For the purposes of subsection 21(6), the applicant shall ensure that an advocate receives a copy of the notice of application and of the accompanying documents when they are served on the parties.

21.-(1) An application to appoint a conservator shall be accompanied by,

(a) the proposed conservator's consent;

(b) a plan of management of the property in the prescribed form; and

(c) if the proposed conservator is not the Public Guardian and Trustee, one of the following:

1. The Public Guardian and Trustee's certificate that he or she has examined and approved the plan of management, has assessed the proposed conservator and any arrangements for bonding and does not object to the appointment.
2. The Public Guardian and Trustee's reasons for not giving the certificate.

Delivery to Advocate:

The applicant provides the advocate with the documentation that the advocate is to explain to the person alleged to be incapable.

At one point in its deliberations, the Committee contemplated and rejected the advocate serving the documentation on the person alleged to be incapable. This would reduce the costs of additional service and avoid having threatening legal documents served before an explanation is available. On reflection, these benefits are outweighed by the advocate being associated in the mind of the person who is mentally disadvantaged with the delivery of documentation and those who wish to remove his or her rights to manage property.

Evidence on Application:

The first set of documents that are required on an application for the appointnment of a conservator relate to the availability and suitability of the person proposed as conservator: his or her consent to act; the plan for managing the property; the Public Guardian and Trustee's screening, including the availability of a bond for the value of the property.

Where a person other than the Public Guardian and Trustee is applying for court appointment as conservator, the Committee is of the view that the Public Guardian and Trustee should play a similar role in reviewing the suitability of the applicant as the Committee has recommended the office play in connection with the private statutory conservator (see section 15). However, the court must control its own process of appointing conservators. It is contemplated that a first review of the appropriateness of the applicant, the plan of management and whether a bond will be available, would be done by the Public Guardian and Trustee.

The Mental Incompetency Act, as amended

9. An alleged mentally incompetent person is entitled to demand, by notice in writing to be given to the person applying for the declaration of his mental incompetency and also to be filed in the office of the clerk of the county or district court in which the proceedings have been brought, at least ten days before the first day of the sittings at which the issue is directed to be tried, that any issue directed to determine the question of his mental incompetency shall be tried with a jury, and, unless he withdraws the demand before the trial, or the court is satisfied by personal examination of the mentally incompetent person that he is not mentally competent to form and express a wish for a trial by jury and so declares by order, the issue shall be tried by a jury. R.S.O. 1970, c. 271, s. 9.

10.—(1) For the purposes of the examination mentioned in section 9, or where it is considered proper for any other purpose, the court may require the alleged mentally incompetent person to attend at such convenient time and place as the court appoints.

(2) The court may by order require an alleged mentally incompetent person to attend and submit to examination by one or more medical practitioners at such time and place as the order directs. R.S.O. 1970, c. 271, s. 10.

(2) If the applicant wishes the application to be dealt with under section 22 (summary disposition), it shall also be accompanied by,

(a) two statements, each made in the prescribed form by a person who knows the person alleged to be incapable and has been in personal contact with him or her during the twelve months preceding the notice of application;

(b) if only one statement described in clause (a) can be obtained, that statement as well as a statement made in the prescribed form by a psychiatrist, physician, psychologist or social worker;

(c) if no statement described in clause (a) can be obtained, two statements, each made in the prescribed form by a psychiatrist, physician, psychologist or social worker.

(3) Each statement shall,

(a) indicate that its maker is of the opinion that the person is incapable of managing property, and set out the facts on which the opinion is based;

(b) indicate that its maker can expect no direct or indirect pecuniary benefit as the result of the appointment of a conservator.

(4) The statement may also indicate that its maker is of the opinion that the person needs decisions to be made on his or her behalf by a person who is authorized to do so and, in that case, shall set out the facts on which the opinion is based.

The Committee feels that if two persons who are well acquainted with the person who is allegedly incapable and have nothing to gain by the appointment of a conservator, express, in a standard form document, their observations of behaviour showing that the person is incapable of managing property, in the absence of any objection or evidence to the contrary, the burden of proof may be discharged. The standard form documentation would require the person completing it to understand the legal meaning of mental incapacity to manage property. In some cases, professional opinions on capacity to manage property will be presented particularly where two persons are unavailable or unwilling to attest to the allegedly incapable person's capacity. The minimum documentation required for the application to be disposed of summarily (section 22) is two statements. The court will determine the sufficiency of the evidence. Those who know the individual alleged to be incapable would also be aware of the person's circumstances so that they may be able to comment on the person's need for a conservator. Subsection 22(1) ensures that at least one of the statements made addresses this matter, if the application is to be disposed of summarily.

One of the major legal costs arising out out of the existing court process under the Mental Incompetency Act is the cost of the preparation of affidavits. An affidavit is a written statement, confirmed by oath or affirmation and used as evidence. Rules of evidence prevent the use of most documentary evidence not in this form. If affidavits must be prepared by lawyers for the individuals who are expressing their observations showing that a person is incapable of managing, major legal costs would be added to the system. The Committee recommends the development of statements in forms prescribed by regulations that can be used for evidentiary purposes. Making a statement containing facts known to be false, or opinions not actually held, should be punishable by fine. In this section these statements would have the effect of affidavits in that they could be used as evidence by the court and could be cross-examined upon. The Committee feels that standard form documents can be developed that will obtain the necessary information and convey the seriousness of the document and their potential use to the signers.

(5) Each statement described in clause (2)(b) shall indicate that its maker performed an assessment of the person's capacity during the six months preceding the notice of application.

(6) An advocate shall visit the person alleged to be incapable of managing property and explain to him or her the significance of the notice of application and accompanying documents and the right to oppose the application.

(7) The applicant shall file the advocate's statement, in the prescribed form, indicating that the advocate has complied with subsection (6), or that he or she was prevented from visiting the person despite attempts to do so.

(8) If the advocate was prevented from visiting the person, the statement shall contain a detailed explanation.

Statement of Advocate:

A person alleged to be incapable may be frightened by court proceedings or be unassertive of his or her rights, without being incapable of managing property. The Committee believes that for a summary procedure to be an effective method of ascertaining mental capacity, effort must be directed to making the proceedings comprehensible to those affected by them. The advocate would be a person whose function is to assist individuals who are mentally disadvantaged to live in the community. The advocate would visit the person who is allegedly incapable and explain the nature of the process to ensure that the person has the best possible understanding of what is happening. Where the person wants to object to the process, the role of the advocate would be to put the person in contact with those who can provide legal assistance. This personal contact by someone trained to deal with those of diminished capacity is considered by the Committee to be an essential component of the application process.

22.-(1) The registrar of the court shall submit he notice of application and accompanying ocuments to a judge of the court if the following onditions are satisfied:

1. No person has delivered a notice of appearance.
2. The statements referred to in subsection 21(2) (statements of witnesses) accompany the application.
3. At least one of the statements referred to in subsection 21(2) indicates that its maker is of the opinion that the person needs decisions to be made on his or her behalf by a person who is authorized to do so.

(2) On hearing the application, the judge may,

(a) grant the relief sought;

(b) adjourn the application and require the parties or their counsel to adduce additional evidence or make representations; or

(c) order that the application, or any issue, proceed to trial, and give such directions as are just.

Disposition of Application:

The Committee envisages that the non-court statutory conservatorship procedure (section 14) will be used in many situations where a substitute decision maker is required to manage a person's property and the person does not oppose having a conservator. However, there will still be many situations where the non-coercive section 14 process will be inapplicable. If a person who is mentally incapable of managing property refuses a professional assessment or refuses to have a statutory conservator, his or her protection may require a court application. That form of statutory conservatorship can be terminated by the giving of notice to the conservator. Protection of a person who is mentally incapable from exploitation may require a more enduring court appointed conservator.

The Public Guardian and Trustee as safety net would make applications in cases of suspected abuse or neglect where those with custody of the incapable person refuse to cooperate. The court route would also be followed where a simultaneous application is made for the appointment of a guardian. To meet this need, the Committee has developed an approach that is both cost-effective and protective of legal rights.

If the appropriate documentation is provided to the court and no notice of appearance has been delivered opposing the process, the registrar of the Court submits to the judge the application and evidence in support. If satisfied by the documentation, the court may dispose of the matter summarily by appointing a conservator. Parties do not appear at the hearing unless requested to do so by the court.

If a notice of appearance is delivered, the application proceeds to trial. The court has the fullest powers to assure itself that all aspects of the process are proper. This is also the case if the court is not satisfied with the documentary evidence in an uncontested application. Of course, parties should have counsel if an application proceeds to trial.

23.-(1) A person who provides residential, social, health care, training or support services to an incapable person for compensation shall not be appointed his or her conservator.

(2) Subsection (1) does not apply to members of the incapable person's family or to the following persons:

1. The guardian.
2. The attorney for personal care.
3. The attorney under a continuing power of attorney.
4. The preferred conservator designated under section 13.

(3) Except in the case of an application that is being dealt with under section 22 (summary disposition), the court shall consider,

(a) whether the proposed conservator is the attorney under a continuing power of attorney or has been designated as preferred conservator under section 13;

(b) the incapable person's wishes, if known; and

(c) the closeness of the applicant's personal relationship to the incapable person.

(4) The court may, with their consent, appoint two or more persons as joint conservators or may appoint each of them as conservator for a specified part of the property.

Qualifications of Conservator:

This provision is intended to prevent conflicts of interest of professional service providers. However, an individual when mentally capable can overcome this general rule by appointing an individual as his or her attorney under a continuing power of attorney or attorney for personal care or by designating the care giver to be a preferred conservator.

This provision allows family to be appointed conservators, even though they may be care givers for compensation. In many cases, the benefits of having someone personally close to an individual manage the property is seen to outweigh the risk of conflict. The duties of the conservator, the reporting and accounting requirements and the surety bond should provide significant, though not total, protection from wrongful acts by a conservator.

Subsection (3) establishes certain issues that must be considered by the court in a case where there are matters being contested. Where there is a dispute as to who is more appropriate as conservator, this subsection directs the court to determine as best it can the wishes of the person who is incapable of managing. Where the intentions or wishes cannot be ascertained, the closeness of the personal relationship is the guide.

Where the summary disposition provision (section 22) is being used, it is because the person who is mentally incapable of managing and those who could have filed an appearance and objected to the process, have indicated their acceptance of the appointment of the conservator.

Subsection (4) gives the court the flexibility to appoint joint conservators or to appoint different persons to manage different parts of the property of the person who is incapable.

COMMITTEE'S PROPOSED LEGISLATION

24.-(1) An order appointing a conservator for a person's property shall include a finding that the person is incapable of managing property and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.

(2) An order appointing a conservator may,

(a) require that the conservator post security in the manner and amount that the court considers appropriate;

(b) make the appointment for a limited term as the court considers appropriate;

(c) impose such conditions on the appointment as the court considers appropriate.

25.-(1) The court may, on any person's application, vary an order appointing a conservator or substitute another person as conservator.

(2) Section 20 (service of notice, parties) and subsections 21(6), (7) and (8) (visit by advocate) apply to the application, with necessary modifications.

(3) In establishing the facts necessary to support the application, the standard of proof is proof on the balance of probabilities.

COMMENTARY

Contents of Court Order:

Once the court has found that the person is mentally incapable of managing property, and has appointed a conservator the order may be made suitable to the situation. Ordinarily, the court will require the posting of security equal to the value of the property. Security will usually take the form of a surety bond whereby a bonding company will guarantee that if the conservator breaches his duties and causes financial damage to the estate, it will reimburse the estate.

In some cases it may be desirable to limit the term of the appointment based on the prognosis for recovery of the person who is incapable.

As is discussed in some detail under property management (section (32), the Committee believes that conservators should not be limited in their choice of investments but should be governed by the plan of management and be under a duty and standard of prudent management.

Variation:

The court may on application vary orders made under this provision. As well, a conservator can be substituted for another, for example, where the first conservator dies or becomes unwilling or unable to perform his/her duties. In appointing the replacement conservator the court would follow the criteria set out in the court application procedure.

EXISTING LAW

The Mental Incompetency Act, as amended

12.—(1) Where an order has been made declaring a person a mentally incompetent person under section 7 or incapable of managing his affairs under section 39, the court, in the same or a subsequent order, shall,

(*a*) appoint a committee of the person or of the estate of the person, or both;

(*b*) propound a scheme for the management of the estate of the person; and

(*c*) fix a time for the passing of the accounts of the committee.

26.-(1) Loss of a significant part of a person's property, or failure to provide necessities of life for oneself or for one's dependants, are serious adverse effects for the purposes of this section.

(2) If, in the opinion of the Public Guardian and Trustee, a person is incapable of managing property and prompt action is required to prevent serious adverse effects, the Public Guardian and Trustee shall apply to the court for an order appointing him or her as temporary conservator.

(3) Notice of the application shall be served on the person alleged to be incapable, unless the court dispenses with notice in view of the nature and urgency of the matter.

Serious Adverse Effects:

The additional finding of serious adverse effects, that is, the loss of a significant part of a person's property, or failure to provide necessities of life for oneself or one's dependants, provides the justification for a substitute decision maker's appointment in urgent cases. The urgency of the situation will depend on the harm likely to be suffered by the person. The Committee believes that the appointment of a temporary conservator is only appropriate where the harm amounts to a serious adverse effect.

In keeping with the values underlying our Report, this proposed approach cannot be used as a means of social control. It is not applicable when a person is merely unreasonable in providing for himself or herself or for his or her dependants. The non-provision of necessities must result from the person's incapacity to manage property. The Committee recognizes that dependants may take legal action where necessities are not provided, but it is as absurd to take to Family Court a person who is mentally incapable of satisfying an order, as it is to bring an application for conservatorship for a capable person who simply refuses to provide support. In the former situation, conservatorship is appropriate.

Temporary Conservator:

This provision allows the Public Guardian and Trustee to act promptly where there is non-provision of necessities of life from the individual's property or there are specific transactions effecting the preservation of property of a person who is apparently incapable, for example, the payment of bills or a mortgage to prevent foreclosure or to provide funds for necessaries.

Notice is required to be given to the person who is allegedly incapable but the court may dispense with this in view of the urgency of the transaction.

The Mental Incompetency Act,

as amended

12.—(3) The court may appoint a committee to act with such powers as it may confer upon him until a scheme of management is propounded and a permanent committee appointed, and any such appointment need not be confirmed. R.S.O. 1970, c. 271, s. 12.

COMMITTEE'S PROPOSED LEGISLATION

(4) For the purpose of an application to appoint temporary conservator, the standard of proof that ne person is incapable of managing property and hat, as a result, the person is suffering or is ikely to suffer serious adverse effects is proof n the balance of probabilities.

(5) The court may by order appoint the Public uardian and Trustee as temporary conservator for a eriod not exceeding ninety days.

(6) The order shall set out the temporary onservator's powers and any conditions imposed on he conservatorship.

(7) On the application of the Public Guardian nd Trustee or of the person whose property is nder conservatorship, the court may terminate the onservatorship or reduce or extend its term.

(8) An application by the person whose property s under conservatorship to terminate the onservatorship suspends the temporary onservator's powers, unless the court orders therwise.

27.-(1) The court may, on any person's pplication, terminate a conservatorship created nder section 19.

COMMENTARY

On a temporary application for such limited purposes, the standard of proof of mental incapacity is proof on the balance of probabilities.

The appointment of the temporary conservator is limited in time and may be limited in extent. It may also be reduced or extended by the court.

Termination of Conservatorship:

The Committee believes that it should be as simple to terminate an order appointing a conservator as it is to create one. Therefore, a hearing requiring parties to appear should not be necessary where an application is made for termination and the application is unopposed.

EXISTING LAW

The Mental Incompetency Act, as amended

11.—(1) Upon application at any time after the expiration of one year from the date of the order by which a person has been declared a mentally incompetent person, or sooner by leave of the court, the court, if satisfied that the person has become mentally competent and capable of managing his own affairs, may make an order so declaring.

(2) The standard of proof that the person whose property is under conservatorship is capable of managing property is proof on the balance of probabilities.

(3) An application by the person whose property is under conservatorship to terminate the conservatorship suspends the conservator's powers, unless the court orders otherwise.

28.-(1) Notice of an application to terminate a conservatorship shall be served, together with the documents described in subsection 29(1),

(a) on the person whose property is under conservatorship;

(b) on the conservator;

(c) on the Public Guardian and Trustee;

(d) on the person's guardian or attorney for personal care, if known.

(2) The notice and accompanying documents need not be served on the applicant.

(3) The notice and accompanying documents shall also be served on at least two of the following persons, by ordinary mail sent to their last known address, in accordance with subsection (4):

1. The spouse of the person whose property is under conservatorship and the person's children who are at least eighteen years old.

It should be noted that the standard of proof is lower to terminate a conservatorship than to establish it [see subsection 19(3)]. On an application for conservatorship those who would remove a person's right to manage his or her own property must prove incapacity beyond reasonable doubt. To restore an individual's right to manage, it must only be shown that the person is more likely than not capable of management.

The process for termination is analogous to the process for appointing a conservator. Notice must be given to interested persons. The consent of the Public Trustee must be sought. It is expected that the Public Trustee's office would examine the application and investigate, where necessary, to determine whether the application was brought for some wrongful purpose, for example, to obtain control of assets rightfully belonging to the incapable person.

(2) Any such order is subject to appeal as provided by subsections 7 (3) and (4).

(3) Instead of making an order under subsection (1), the court may direct an issue to try the question of the recovery of the person so formerly declared or adjudged a mentally incompetent person.

(4) Any issue so directed is subject to sections 8 and 9.

(5) Where a person formerly declared a mentally incompetent person has been found to be mentally competent and capable of managing his own affairs and the time for appealing from or moving against the order or verdict has expired, or if an appeal is taken or a motion made, when the same has been finally dismissed, an order may be issued superseding, vacating, and setting aside the order declaring the mental incompetency of the person for all purposes except as to acts or things done in respect of the person or estate of the mentally incompetent person while the order was in force. R.S.O. 1970, c. 271, s. 11.

2. The person's parents.

3. The person's brothers and sisters who are at least eighteen years old.

4. The person's friends who are at least eighteen years old and have been in personal contact with him or her during the preceding twelve months.

(4) All the persons described in paragraph 1 of subsection (3) who are known shall be served, and if fewer than two persons described in that paragraph are served, all the persons described in the next paragraph who are known shall be served, and so on until at least two persons have been served.

(5) The parties to the application are the applicant and the persons served under clauses (1)(a), (b), (c) and (d).

(6) A person described in clause (1)(d) who was not served, and a person described in subsection (4), whether served with notice of the application or not, is entitled to be added as a party at any stage in the proceeding if he or she serves a notice of appearance on every person who was served under subsection (1) and files it with proof of service.

(7) For the purposes of subsection 29(4), the applicant (except where he or she is the person whose property is under conservatorship), shall ensure that an advocate receives a copy of the notice of application and of the documents

described in subsection 29(1) when they are served on the parties.

29.-(1) If the applicant wishes the application to be dealt with under section 30 (summary disposition), it shall also be accompanied by,

(a) two statements, each made in the prescribed form by a person who knows the person whose property is under conservatorship and has been in personal contact with him or her during the twelve months preceding the notice of application;

(b) if only one statement described in clause (a) can be obtained, that statement as well as a statement made in the prescribed form by a psychiatrist, physician, psychologist or social worker;

(c) if no statement described in clause (a) can be obtained, two statements, each made in the prescribed form by a psychiatrist, physician, psychologist or social worker.

(2) Each statement shall,

(a) indicate that the maker of the statement is of the opinion that the person is capable of managing property, and set out the facts on which the opinion is based; and

(b) indicate that the maker of the statement can expect no direct or indirect pecuniary benefit as the result of the termination of the conservatorship.

(3) Each statement described in clause (1)(b) shall indicate that its maker performed an assessment of the person's capacity during the six months preceding the application.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(4) Except where the person whose property is under conservatorship is the applicant, an advocate shall visit the person and explain to him or her the significance of the notice of application and accompanying documents and the right to oppose the application. (5) The applicant shall file the advocate's statement, in the prescribed form, indicating that the advocate has complied with subsection (4) or that he or she was prevented from visiting the person despite attempts to do so. (6) If the advocate was prevented from visiting the person, the statement shall contain a detailed explanation.	The advocate is required to pay a visit to the person under conservatorship if that person is not the applicant. The purpose of this visit is to provide assurance that the person who has had a conservator to manage his or her property is aware and is prepared to take the steps necessary to manage the property for him or herself.	
30.-(1) The registrar of the court shall submit the notice of application and accompanying documents to a judge of the court if the following conditions are satisfied: 1. No person has delivered a notice of appearance. 2. The statements referred to in subsection 29(1) (statements of witnesses) accompany the application. (2) On hearing the application, the judge may, (a) grant the relief sought; (b) adjourn the application and require the parties or their counsel to adduce additional evidence or make representations; or (c) order that the application, or any issue, proceed to trial, and give such directions as are just.	Section 30, like section 22, provides for the summary disposition of the application without the attendance of the parties or legal counsel when there is no opposition to the application. It also provides a court that is not satisfied with the evidence, with the authority to obtain further and better evidence or explanation from the parties.	

PROPERTY MANAGEMENT

Authority of Conservators and Attorneys:

At present, three totally different statutory approaches exist with regard to conferring powers and authority to manage the property of a person who is mentally incapable. The three applicable statutes are the Mental Health Act, the Mental Incompetency Act and the Powers of Attorney Act. Where a person is medically certified as incapable of managing his or her property under Part III of the Mental Health Act, the Public Trustee becomes committee of the estate. The Public Trustee's powers in that case are full and absolute as set out in section 46 of the Mental Health Act.

Contrasted with this is the power and authority of a committee appointed under either section 7 or section 39 of the Mental Incompetency Act. In that situation the committee has only the specified powers and authority conferred by the court in the order. There is some doubt whether the court can confer full power and authority even on the Public Trustee as committee under the Mental Incompetency Act. For example, in making an investment, the court-appointed committee is now limited to those types of investments set out in the legal list of investments in sections 26 and 27 of the Trustee Act. No similar limitation is imposed on the Public Trustee under Part 3 of the Mental Health Act. Indeed, it has become common in drafting private trust documents for a settlor of property to provide that the trustees may make investments other than those in sections 26 and 27 of the Trustee Act. The restrictions of those sections can, in inflationary periods, create problems for a committee of the estate attempting to maintain the income of the estate and to provide for the person who is incapable and his or her dependents.

The Mental Health Act, as amended

46. The Public Trustee as committee of a patient or out-patient has and may excercise all the rights and powers with regard to the estate of the patient or out-patient that the patient or out-patient would have if of full age and of sound and disposing mind. 1978, c. 50, s. 15, *part*.

The Mental Incompetency Act, as amended

14. The powers conferred by this Act as to the management and administration of a mentally incompetent person's estate are exercisable in the discretion of the court for the maintenance or benefit of the mentally incompetent person or of his family or, where it appears to be expedient, in the due course of management of the property of the mentally incompetent person. R.S.O. 1970, c. 271, s. 14.

15. Nothing in this Act subjects a mentally incompetent person's property to claims of his creditors further than it is now subject thereto by due course of law. R.S.O. 1970, c. 271, s. 15.

16.—(1) The court may order that any property of the mentally incompetent person, whether present or future, be sold, charged, mortgaged, dealt with or disposed of as is considered most expedient for the purpose of raising or securing or repaying, with or without interest, money that is to be or has been applied to,

(*a*) payment of the mentally incompetent person's debts or engagements;

(*b*) discharge of any encumbrance on his property;

(*c*) payment of any debt or expenditure incurred for his maintenance or otherwise for his benefit;

(*d*) payment of or provision for the expenses of his future maintenance

COMMITTEE'S PROPOSED LEGISLATION

31.-(1) A conservator has power to do on the icapable person's behalf anything in respect of roperty that the person could do if capable, cept make a will.

(2) The conservator's powers are subject to this t and to any conditions imposed by the court.

COMMENTARY

Whatever historical rationale may have existed for the approach taken in the Mental Incompetency Act, that approach no longer fits with the authority of an attorney under a continuing power as provided by the Powers of Attorney Act. A person can create a continuing power of attorney that confers on the attorney full and absolute power to deal with his or her property when the person becomes incapable. Although continuing powers can be limited in the powers the donor confers on the attorney, few limited powers have been created. The result is that there are almost no controls placed on an attorney acting under a continuing power and almost total control over a committee appointed by the court. This disparity does not appear justifiable.

It would appear reasonable, to the Committee, to bring the powers and authority conferred by a court appointment into line with the approach taken in the Mental Health Act and the Powers of Attorney Act. While there are some risks in adopting this approach, the added risks are not significant. Conservators would usually be bonded. The risks with respect to all forms of substitute decision making over property would be reduced by implementation of the Committee's recommendations regarding the imposition of specific duties on all these substitute decision makers with respect to property. These matters are dealt with in sections 32 to 39 dealing with the management of property. Therefore, this section provides that a conservator, whether court-appointed or statutory, like an attorney under a continuing power, has authority to do on behalf of the person who is incapable anything in respect of property that the person could do if capable, except to make a will. The making of a will is a personal act and is not now and should not be delegable.

The powers of attorneys under continuing powers can be limited by the donor in the document, the power and authority of statutory conservators may be limited by the court under section 16 and the powers of court-appointed conservators may be limited by the court under section 24.

EXISTING LAW

(2) Where a charge or mortgage is made under this Act for the expenses of future maintenance, the court may direct the same to be payable either contingently if the interest charged is contingent or future, or upon the happening of the event if the interest is dependent on an event that must happen, and either in a gross sum or in annual or other periodical sums, and at such times and in such manner as are considered expedient. R.S.O. 1970, c. 271, s. 16.

17.—(1) The court may order that the whole or a part of any moneys expended or to be expended under an order of the court for the permanent improvement, security, or advantage of the property of the mentally incompetent person, or of a part thereof, shall, with interest, be a charge upon the improved property or any other property of the mentally incompetent person, but so that no right of sale or foreclosure during the lifetime of the mentally incompetent person is conferred by the charge.

(2) The interest shall be kept down during the mentally incompetent person's lifetime out of the income of his general estate, as far as his general estate is sufficient to bear it.

(3) The charge may be made either to a person advancing the money or, if the money is paid out of the mentally incompetent person's general estate, to a person as trustee for him as part of his personal estate. R.S.O. 1970, c. 271, s. 17.

18. The court may by order authorize and direct the committee of the estate of a mentally incompetent person to do all or any of the following things:

(*a*) sell any property belonging to the mentally incompetent person;

(*b*) make exchange or partition of any property belonging to the mentally incompetent person, or in which he is interested, and give or receive any money for equality of exchange or partition;

(*c*) carry on any trade or business of the mentally incompetent person;

(*d*) grant leases of any property of the mentally incompetent person for building, agricultural, or other purposes;

(*e*) grant leases of minerals forming part of the mentally incompetent person's property, whether the minerals have been worked or not, and either with or without the surface or other land;

(*f*) surrender any lease and accept a new lease;

(*g*) accept a surrender of any lease and grant a new lease;

(*h*) execute any power of leasing vested in a mentally incompetent person having a limited estate only in the property over which the power extends;

(*i*) perform any contract relating to the property of the mentally incompetent person entered into by him before his mental incompetency;

(*j*) surrender, assign, or otherwise dispose of with or without consideration any onerous property belonging to the mentally incompetent person;

(*k*) exercise any power or give any consent required for the exercise of any power where the power is vested in the mentally incompetent person for his own benefit or the power of consent is in the nature of a beneficial interest in the mentally incompetent person;

(*l*) give consent to the transfer or assignment of a lease where the consent of the mentally incompetent person to the transfer or assignment thereof is requisite;

(*m*) invest or reinvest any money in his hands belonging to the mentally incompetent person in the classes of securities in which a trustee may invest trust money under the *Trustee Act*. R.S.O. 1970, c. 271, s. 18.

19. Any property taken in exchange and any renewed lease accepted on behalf of a mentally incompetent person under this Act shall be to the same uses and be subject to the same trusts, charges, encumbrances, dispositions, devices, and conditions as the property given in exchange or the surrendered lease was or would, but for the exchange or surrender, have been subject to. R.S.O. 1970, c. 271, s. 19.

20.—(1) The power to authorize leases of a mentally incompetent person's property under this Act extends to property of which the mentally incompetent person is tenant in tail, and every lease granted pursuant to any order under this Act binds the issue of the mentally incompetent person and all persons entitled in remainder and reversion expectant upon the estate tail of the mentally incompetent person, including the Crown, and every person to whom from time to time the reversion expectant upon the lease belongs upon the death of the mentally incompetent person has the same rights and remedies against the lessee, his executors, administrators and assigns as the mentally incompetent person or his committee would have had.

(2) Leases authorized to be granted or accepted by or on behalf of a mentally incompetent person under this Act may be for such number of lives or such term of years, at such rent and royalties, and subject to such reservations, covenants, and conditions as the court may approve.

(3) Premiums or other payments on the renewal of leases may be paid out of the mentally incompetent person's estate, or charged with interest on the leasehold property. R.S.O. 1970, c. 271, s. 20.

21.—(1) The mentally incompetent person, his heirs, executors, administrators, next of kin, devisees, legatees and assigns have the same interest in any money arising from any sale, mortgage or other disposition, under the powers of

COMMITTEE'S PROPOSED LEGISLATION

COMMENTARY

EXISTING LAW

this Act, which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage or disposition, if no sale, mortgage or disposition had been made, and the surplus money shall be of the same nature as the property sold, mortgaged or disposed of.

(2) Money received for equality of partition and exchange, or under any lease of unopened mines, and all premiums and sums of money received upon the grant or renewal of a lease, where the property the subject of the partition, exchange or lease was land of the mentally incompetent person, shall, subject to the application thereof for any purposes authorized by this Act, as between the representatives of the real and personal estate of the mentally incompetent person, be considered as real estate, except in the case of premiums and sums of money received upon the grant or renewal of leases of property of which the mentally incompetent person was tenant for life, in which case the premiums and sums of money are personal estate of the mentally incompetent person.

(3) In order to give effect to this section, the court may direct any money to be carried to a separate account, and may order such assurances and things to be executed and done as are considered expedient. R.S.O. 1970, c. 271, s. 21.

22. The committee of the estate, or such person as the court may approve, shall, in the name and on behalf of the mentally incompetent person, execute and do all such assurances and things for giving effect to any order under this Act as the court may direct, and every such assurance and thing is valid and effectual and takes effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject. R.S.O. 1970, c. 271, s. 22.

23. Where a power is vested in a mentally incompetent person in the character of trustee or guardian, or the consent of a mentally incompetent person to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the Supreme Court to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the mentally incompetent person, under an order of the Supreme Court made upon the application of any person interested, may exercise the power or give the consent in such manner as the order may direct. R.S.O. 1970, c. 271, s. 23.

24. Where the Supreme Court exercises, in the name and on behalf of a mentally incompetent person, a power of appointing new trustees vested in the mentally incompetent person, the Supreme Court, where it seems to be for the mentally incompetent person's benefit and also expedient, may make any order respecting the property subject to the trust that might have been made in the same case under the *Trustee Act* on the appointment thereunder of a new trustee or new trustees. R.S.O. 1970, c. 271, s. 24.

25.—(1) Where it appears to the court that there is reason to believe that the mental incompetency of a mentally incompetent person so found is in its nature temporary, and will probably be soon removed, and that it is expedient that temporary provision be made for the maintenance of the mentally incompetent person, or of the mentally incompetent person and the members of his immediate family who are dependent upon him for maintenance, and that any sum of money arising from or being in the nature of income or of ready money belonging to him and standing to his account with a banker or agent, or being in the hands of any person for his use, is readily available, and may be safely and properly applied in that behalf, the court may allow thereout such amount as is considered proper for the temporary maintenance of the mentally incompetent person or of the mentally incompetent person and the members of his immediate family who are dependent upon him for maintenance, and may, instead of proceeding to order a grant of the custody of the estate, order or give liberty for the payment of any such sum of money, or any part thereof, to such person as in the circumstances of the case it is thought proper to entrust with the application thereof, and may direct it to be paid to such person accordingly, and when received to be applied and it shall accordingly be applied in or towards such temporary maintenance.

(2) The receipt in writing of the person to whom payment is to be made for any money payable to him by virtue of an order under this section is a good discharge, and every person shall act upon and obey every such order.

(3) The person receiving any money by virtue of an order under this section shall pass an account thereof when and as the court may direct. R.S.O. 1970, c. 271, s. 25.

VESTING ORDERS

26. Where any stock is standing in the name of or is vested in a mentally incompetent person beneficially entitled thereto, or is standing in the name of or vested in the committee of the estate of a mentally incompetent person so found in trust for the mentally incompetent person or as part of his property, and the committee dies intestate, or himself becomes a mentally incompetent person, or is out of Ontario, or it is uncertain whether the committee is living or dead, or he neglects or refuses to transfer the stock, or to receive or pay over the dividends thereof as directed by an order of the Supreme Court, then the Supreme Court may order some fit person to transfer the stock to or into the name of a new committee, or of the Accountant of the Supreme Court, or otherwise, and also to receive and pay over the dividends in such manner as it may direct. R.S.O. 1970, c. 271, s. 26.

27. Where any stock is standing in the name of or vested in a person residing out of Ontario, the Supreme Court, upon proof that he has been declared a mentally incompetent person and that his personal estate has been vested in a person appointed for the management thereof according to the law of the place where he is residing, may order some fit person to make such transfer of the stock or any part

COMMITTEE'S PROPOSED LEGISLATION

COMMENTARY

EXISTING LAW

thereof to or into the name of the person so appointed, or otherwise, and also to receive and pay over the dividends thereof as it may direct. R.S.O. 1970, c. 271, s. 27.

28.—(1) Where a mentally incompetent person is solely or jointly seised or possessed of any land upon trust or by way of mortgage, the Supreme Court may by order vest the land in such person or persons for such estate and in such manner as it may direct.

(2) Where a mentally incompetent person is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the Supreme Court may by order release the land from the contingent right and dispose of it to such person as it may direct.

(3) An order made under subsection (1) or (2) has the same effect as if the trustee or mortgagee had been sane and had executed a deed conveying the land for the estate named in the order, or releasing or disposing of the contingent right.

(4) Where an order may be made under this section, the court may, if it is more convenient, appoint a person to convey the land or release the contingent interest, and a conveyance or release by such person in conformity with the order has the same effect as an order under subsection (1) or (2). R.S.O. 1970, c. 271, s. 28.

29.—(1) Where a mentally incompetent person is solely entitled to any stock or chose in action upon trust or by way of mortgage, the Supreme Court may by order vest in any person the right to transfer or to call for a transfer of the stock or to receive the dividends thereof, or vest in any person the chose in action, or any interest in respect thereof.

(2) Where a person is jointly entitled with a mentally incompetent person to any stock or chose in action upon trust or by way of mortgage, the Supreme Court may make an order vesting the right to transfer or to call for a transfer of the stock or to receive the dividends thereof or vesting the chose in action or any interest in respect thereof either in such person alone or jointly with any other person.

(3) Where any stock is standing in the name of a deceased person whose personal representative is a mentally incompetent person or where a chose in action is vested in a mentally incompetent person as the personal representative of a deceased person, the Supreme Court may make an order vesting the right to transfer or to call for a transfer of the stock or to receive the dividends thereof or vesting the chose in action or any interest in respect thereof in any person whom it may appoint.

(4) Where an order may be made under this section, the court may, if it is more convenient, appoint some fit person to make or join in making the transfer. R.S.O. 1970, c. 271, s. 29.

30.—(1) The person in whom the right to transfer or to call for a transfer of any stock is vested may execute and do all powers of attorney, assurances and things to complete the transfer according to the order, and the transfer is valid and effectual to all intents and purposes, and banks and other companies and their officers and all other persons are bound to obey every such order according to its terms.

(2) After notice in writing of an order under this Act, it is not lawful for a bank or other company to transfer stock to which the order relates or pay any dividends except in accordance with the order. R.S.O. 1970, c. 271, s. 30.

31. This Act and every order purporting to be made under this Act is a full indemnity and discharge to any bank and other company and society and their respective officers and servants and all other persons for all acts and things done or permitted to be done pursuant thereto so far as relates to any property in which a mentally incompetent person is interested either in his own right or as trustee or mortgagee, and it is not necessary to inquire into the propriety of any order purporting to be made under this Act relating to any such property or the jurisdiction to make such order. R.S.O. 1970, c. 271, c. 31.

32. The fact that an order made under this Act for conveying or vesting land or releasing or disposing of a contingent right has been founded on an allegation of the mental incompetency of a trustee or mortgagee is conclusive evidence of the fact alleged in any court upon any question as to the validity of the order, but this section does not prevent the court from directing a reconveyance of any land or contingent right dealt with by the order, or from directing any party to any proceeding concerning such land or right to pay any costs occasioned by the order, where the order appears to have been improperly obtained. R.S.O. 1970, c. 271, s. 32.

33. The powers conferred by this Act as to vesting orders may be exercised by vesting any land, stock or chose in action in the trustee or trustees of any charitable society or in any incorporated charitable body over which the court would have jurisdiction upon action duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power or by the court under its general or statutory jurisdiction. R.S.O. 1970, c. 271, s. 33.

34. The court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under this Act is to be exercised. R.S.O. 1970, c. 271, s. 34.

35. Where the court has jurisdiction to order a conveyance or transfer of land or stock or to make a vesting order, an order may also be made appointing a new trustee or trustees. R.S.O. 1970, c. 271, s. 35.

MISCELLANEOUS

36. Where there is money in any court to the credit of a person who has been found or who is alleged to be a mentally incompetent person and the person is resident in Great Britain or Ireland or in any part of Canada other than Ontario, upon production of an order made by a court having jurisdiction where the person is resident authorizing any person to receive such money, the court may make an order for payment of such money to the person designated in the order to receive it. R.S.O. 1970, c. 271, s. 36.

COMMITTEE'S PROPOSED LEGISLATION

2.-(1) A conservator shall exercise his or her
rs and perform his or her duties with honesty
integrity and in good faith, for the incapable
on's benefit.

2) The conservator shall explain to the
pable person what the conservator's powers are
that he or she will act for the person's
fit.

3) A conservator shall encourage the incapable
on to participate, to the best of his or her
ities, in the conservator's decisions about the
erty.

COMMENTARY

Duties of Conservators and Attorneys:

The existing legislation, the Mental Health Act, the Powers of Attorney Act and the Mental Incompetency Act assume that those discharging these functions are aware that they act in a fiduciary capacity. Therefore, they do not set out the obligations and duties expected at common-law from a fiduciary. It is the Committee's view that under the proposals and draft legislation contained in this report many individuals without ready access to legal advisors will be acting as attorneys, statutory conservators and conservators. Therefore, the Committee has thought it advisable to set out the basic obligations and duties with some clarity to guide those who are making substitute decisions.

Honesty, integrity, good faith and the avoidance of conflict of interest are the essence of the fiduciary obligation. The words "for the person's benefit" are used instead of the commonly used "the best interest of the incapable person" because the words "best interest" are an objective standard of decision-making at variance with the proposed emphasis on authentic decisions. Authentic decisions are those that the person who is incapable would have made if capable. The words "for the benefit" connote that the conservator or attorney should not knowingly place themselves in a position where their personal interests conflict with that of the person who is incapable.

The duty to encourage participation by the person under conservatorship would require conservators to play an active role in the lives of those for whom they act. It is not contemplated that conservators will act, as the law now permits committees of the estates of persons who are incompetent to act, merely in the objective best interest of the person for whom they act.

EXISTING LAW

The Mental Incompetency Act, as amended

13. Where a committee of the estate of a mentally incompetent person has been appointed,

(*a*) the committee shall, within six months after being appointed, file in the office of the clerk of the court in which the appointment was made a true inventory of the whole real and personal estate of the mentally incompetent person, stating the income and profits thereof, and setting forth the debts, credits, and effects of the mentally incompetent person, so far as they have come to the knowledge of the committee;

(*b*) if any property belonging to the estate is discovered after the filing of the inventory, the committee shall file a true account of such property from time to time as it is discovered;

(*c*) every inventory and account shall be verified by the oath of the committee;

(*d*) the committee shall give security for the due performance of his duties in such amount as the court may direct, which security shall be in the form of a bond in the name of the clerk of the court and shall be filed in his office; and

(*e*) the committee shall pass his accounts from time to time at such intervals as the court may direct. R.S.O. 1970, c. 271, s. 13.

14. The powers conferred by this Act as to the management and administration of a mentally incompetent person's estate are exercisable in the discretion of the court for the maintenance or benefit of the mentally incompetent person or of his family or, where it appears to be expedient, in the due course of management of the property of the mentally incompetent person. R.S.O. 1970, c. 271, s. 14.

The Mental Health Act, as amended

54. The Public Trustee is liable to render an account as to the manner in which he has managed the property of a patient or an out-patient in the same way and subject to the same responsibility as any trustee, guardian or committee duly appointed for a similar purpose may be called upon to account, and is entitled from time to time to bring in and pass his accounts and tax costs in like manner as a trustee but is personally liable only for wilful misconduct. 1978, c. 50, s. 15, *part*.

(4) A conservator who does not receive
pensation for managing the property shall
rcise the degree of care, diligence and skill
t a business person of average prudence would
rcise in the conduct of his or her own affairs.

Standard of Management:

The Committee believes that a conservator or attorney under a continuing power of attorney, while not formally a trustee, should be expected to act with diligence, prudence and sagacity.

What standard of care, diligence and skill should be required of a conservator or attorney under a continuing power? In dealing with trusts, the courts have rejected a subjective standard of care for trustees. They have adopted an objective standard to be be applied to every person who becomes a trustee. It does not matter that the person who assumes the management of the estate of another is unskilled or neglectful of his own affairs. When that person is acting as trustee for another, the person must exhibit the same diligence and care that an ordinarily prudent business person would exercise in conducting a business of his or her own. If the person fails to live up to that standard and loss results to the trust, the trustee will be personally liable. In applying an objective standard, the abilities of the person whose conduct is being examined are not considered. A good short discussion of the duty of care for trustees is contained in the Ontario Law Reform Commission Report on the Law of Trusts (1984), at pages 24-35.

Should a conservator or attorney, often a family member, be required to live up to the same standard of care? The Committee believes that the traditional standard imposed by the courts provides a clear picture to persons who assume the responsibility. Their duties must be performed in a hard-headed, business-like fashion.

57. The Public Trustee, out of the moneys in his hands belonging to a person who is a patient or out-patient of whose estate the Public Trustee is committee, shall pay the proper charges for maintenance of the person as a patient in or an out-patient of the psychiatric facility and the Public Trustee may also pay such sums as he considers advisable to the patient's or out-patient's family or other persons dependent upon him, and the payments for the maintenance of the family and other dependants may be made notwithstanding that such payments may prevent the payment of maintenance that otherwise would be due from the patient or out-patient. 1978, c. 50, s. 17, *part*.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
	They have the option of not undertaking the responsibility in which case the Public Trustee will perform the function of conservator. An attorney who is not able to live up to the obligation should refuse the appointment. In addition to its clarity, the standard has the benefit of being well known to the courts.	
) A conservator who receives compensation for ging the property shall exercise the degree of , diligence and skill that a person in the ness of managing the property of others is ired to exercise.	Professional conservators including the Public Trustee and trust companies who are acting for a fee should be required to live up to a higher standard of care, diligence and skill: that of persons in the profession or business of managing estates.	
5) Subsection (5) applies to the Public dian and Trustee.		
7) A conservator other than the Public Guardian Trustee shall act in accordance with the gement plan established for the property.	Statutory and court-appointed conservators are required to develop a plan of management for the estate. The conservator should be responsible for performing his or her duties in accordance with that plan of management.	
8) The management plan may be amended from time ime with the Public Guardian and Trustee's oval.		
9) The Trustee Act does not apply to the cise of a conservator's powers or the formance of his or her duties.	The law applicable to trustees is both statutory, that is, the *Trustee Act*, and judge-made. While parts of that law are relevant to conservators and attorneys under powers of attorney, much is not. It was the Committee's view that many conservators administering modest estates would not have access, on an ongoing basis, to legal counsel to advise them on trust law. It was the Committee's view that it would be more appropriate to set out all the duties of the conservator in this statute. In this way, people who are thinking of applying to become conservators can appreciate the nature of the obligation they may be undertaking. Therefore, the draft provides that the *Trustee Act* does not apply.	

33.-(1) A conservator is liable for damages resulting from a breach of his or her duty.

(2) If the court is satisfied that a conservator who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the conservator from all or part of the liability.

34. Section 32, except subsections (7) and (8), and section 33 also apply, with necessary modifications, to an attorney acting under a continuing power of attorney whose grantor is incapable of managing property.

35.-(1) A conservator shall make the following expenditures from the incapable person's property:

1. The expenditures that are necessary to satisfy the person's legal obligations.
2. The expenditures that are reasonably necessary for the support, education and care of the person and his or her dependants, taking into account their accustomed standard of living.

Liability of Conservator and Attorney Under Continuing Power:

This section provides that the conservator or attorney is liable for damages resulting from his or her breach of a duty.

The Committee believes that there might be situations in which an individual acting as conservator or attorney under a continuing power, particularly a family member, might have failed to exercise the standard of care, diligence and skill required by the statute and yet still have acted honestly, reasonably and diligently. In these circumstances, the court should be empowered to relieve the conservator or attorney, either wholly or partly, from personal liability.

Attorney Under Continuing Power:

Most of the duties imposed on convservators are also imposed on attorneys acting under continuing powers of attorney. The exception to this is the duty to perform duties in accordance with the management plan that is inapplicable because there is no required management plan.

Guiding Principles for Expenditures:

The guiding principles for expenditures attempt to achieve a balance between the conservator's duty to fulfill the legal obligations of the person who is incapable and the conservator's duty to deal with the property of the person in the same manner as the person would have, had he or she not become mentally incapable.

The conservator should be obliged to fulfill the legal obligations of the person who is incapable. This would include the payment of debts and other obligations. Then the conservator should fulfill the obligations of the person both for his or her own welfare and for those who are his or her legal dependents. Those who are providing support, education, care or benefit to the person who is incapable and the legal dependents of the person, have enforceable rights to payment or support.

The Mental Incompetency Act, as amended

14. The powers conferred by this Act as to the management and administration of a mentally incompetent person's estate are exercisable in the discretion of the court for the maintenance or benefit of the mentally incompetent person or of his family or, where it appears to be expedient, in the due course of management of the property of the mentally incompetent person. R.S.O. 1970, c. 271, s. 14.

15. Nothing in this Act subjects a mentally incompetent person's property to claims of his creditors further than it is now subject thereto by due course of law. R.S.O. 1970, c. 271, s. 15.

COMMITTEE'S PROPOSED LEGISLATION

(2) Subject to subsections (3) and (4), a
onservator may make the following expenditures
rom the incapable person's property:

1. Gifts or loans to the person's friends and relatives.
2. Charitable gifts that in total do not, in any one year, exceed 20 per cent of the income of the property in that year.

(3) Expenditures shall be made under subsection
2) only if the property is and will remain more
han sufficient to satisfy the requirements of
ubsection (1).

(4) Expenditures shall be made under subsection
2) only if there is reason to believe, based on
e intentions the incapable person expressed
efore becoming incapable and on the wishes he or
e expresses, that the person would make the
penditures if capable.

(5) The court may, on the conservator's
plication, authorize him or her to make a
aritable gift that exceeds the maximum amount
ferred to in subsection (2).

(6) Expenditures made under this section shall
deemed to be for the incapable person's benefit.

COMMENTARY

Where the person who is incapable, when capable, was extremely frugal, the conservator is directed to "take into account their accustomed standard of living" but expend amounts to the more objective level of what is "reasonably necessary".

Where the assets of the estate are sufficient to provide for the present and future needs of the person who is incapable and those legally dependent on him or her, the Committee believes the conservator should have discretionary power. There should be authority to assist the person's family and those other persons with whom the person who is incapable had a close relationship and about whose welfare he or she had concerns. In order to do so, the conservator should have reason to believe that the person would have given such assistance.

The conservator should also have the duty to make charitable gifts that the person who is incapable would have made where there are ample assets to discharge the other obligations. This power to make charitable gifts is a departure from the existing law governing court appointed conservators. Even when the estate is ample, the power limits charitable gifts to not exceed 20% of the income of the estate in any one year. While this limitation on gift giving is somewhat arbitrary, the Committee felt it to be a prudent limitation. However, the court may, on application, vary the amount where appropriate.

EXISTING LAW

16.—(1) The court may order that any property of the mentally incompetent person, whether present or future, be sold, charged, mortgaged, dealt with or disposed of as is considered most expedient for the purpose of raising or securing or repaying, with or without interest, money that is to be or has been applied to,

- **(*a*) payment of the mentally incompetent person's debts or engagements;**
- (*b*) discharge of any encumbrance on his property;
- (*c*) payment of any debt or expenditure incurred for his maintenance or otherwise for his benefit,
- (*d*) payment of or provision for the expenses of his future maintenance.

(2) Where a charge or mortgage is made under this Act for the expenses of future maintenance, the court may direct the same to be payable either contingently if the interest charged is contingent or future, or upon the happening of the event if the interest is dependent on an event that must happen, and either in a gross sum or in annual or other periodical sums, and at such times and in such manner as are considered expedient R.S.O. 1970, c. 271, s. 16.

36.-(1) A conservator or an attorney under a ontinuing power of attorney may apply to the court or directions on any question arising in the dministration of the property.

(2) The incapable person or his or her dependant, the guardian, the attorney for personal care, or any other person with leave of the court, may also apply to the court for directions to the conservator or attorney on any question arising in the administration of the property.

(3) The court may by order give such directions as it considers to be for the benefit of the person and his or her dependants and consistent with this ct.

(4) The court may, on further application by a erson referred to in subsection (1) or (2), vary he order.

37.-(1) A conservator may take annual ompensation from the property in accordance with he prescribed fee scale.

(2) The compensation may be taken monthly, uarterly or annually.

(3) If all the persons described in clauses 3(2)(a), (b) and (c) (except the incapable person) onsent, the conservator may take compensation on n interim basis or may take an amount of ompensation greater than the prescribed fee scale llows.

Directions by Court:

Few managers of property will be happy to expend the assets of the estate on frivolous court applications. However, there must be a means of resolving highly contentious issues, that arise in the management of property, by obtaining court direction. This provision would be used, for example, by a guardian who believed that the conservator or attorney under a continuing power was not providing reasonable expenditures for the personal care of a person who is incapable. Section 74 sets out a provision whereby the office of Public Guardian and Trustee can mediate private disputes of this nature. It is hoped that mediation will be used more frequently than applications to the court.

Like other provisions related to maintenance of dependants, the court is given power to reopen a matter on which it has given a direction, to consider altered circumstances.

The Entitlement to Compensation:

The Committee believes that the legislation should clearly state that a conservator is entitled to compensation. Some persons may act as conservators without requesting compensation but the task is one that merits compensation. Since attorneys are appointed by the grantor who is free to specify whether compensation is to be paid, the legislation should not provide for the compensation of attorneys.

The Committee believes that the conservator should be able to take normal fees in monthly instalments or quarterly instalments. This is not currently the way that trustees' fees are dealt with. The Committee believes that a conservator should be able to take compensation on a business-like basis.

Current practice of the courts is to award compensation to committees on the same basis as they do to trustees. The Committee feels that this is not always appropriate and that a simplified fee scale should be established by regulation setting out as a normal fee a percentage charge on revenue and a percentage charge on capital value. The Committee feels this would be a more appropriate approach than the present fees which reflect the nature of trusts and estates, rather than the nature of conservatorships. The fee scale could better reflect the work done by the conservator in collecting and disbursing funds, as well as the overall management and investment function. In addition, it would avoid getting into the complexities of the Surrogate Court requirements.

The suggested guidelines to be set by regulation would be annually: 6% of revenue; 3/5 of 1% of the average annual capital value; a 1% one-time set-up fee at the end of the first year; and a 1% one-time close-out fee on the close out of the conservatorship. Simplification is achieved by dropping separate fees for revenue receipts and disbursements and capital receipts and disbursements, and adopting one simple revenue fee for collecting and disbursing same, and one simple capital fee for managing, investing and disbursing same. The revenue fee of 6% is to be calculated only on income received by the estate.

The set up and close out fees are a one time recognition of the inventorying, gathering in, and developing of a scheme of management regarding the assets of the person under conservatorship. The close out fee is recognition of the fact that the recipient whether the now-recovered person who was mentally incapable, or his or her personal representative, or a replacement conservator have the benefit of receiving the assets in an organized, inventoried form, and the effort and expense possibly involved in handling or transferring the assets over.

The fee structure adopted, whether that suggested above or some other, should be recognized as a normal fee for an account of average complexity. Flexibility to adjust fees should exist to reflect the particular size, activity and complexity during any particular accounting period. This flexibility to adjust should exist as time goes on when the normal fee may go out of date or become inappropriate. The draft legislation recognizes two different methods for adjusting and building in flexibility. The first is set out in subsection 37(3) that provides for the agreement of all those persons exercising a supervisory role in connection with the work of a conservator. If they can all agree that compensation on an interim basis or in an amount greater than that prescribed as the normal fee is warranted, it should be allowed. The second method is in connection with a passing of accounts. Subsection 39(6) permits the court to adjust the conservators compensation in accordance with the value of the services performed.

Financial Statement:

At present, none of the statutes governing substitute decision making for persons who are mentally incapable regarding property provide that the manager must prepare an annual financial statement. Currently, a challenge or review of the financial dealings of an attorney under a durable power, or a committee of the estate takes the form of a passing of accounts. The form that this takes is set out in Rules 59-63 of the Surrogate Court.

Rule 61 requires:

1) Statement or original assets.
2) Statement of disbursements.
3) Statement of receipts.
4) Statement of assets on hand.
5) Statement of compensation claim.

In addition, an investment statement is required showing:

a) All money invested.
b) All money received by way of repayments or realizations upon such investments.
c) The balance of all such investments on hand.

The statements of disbursements and receipts, (2) and (3) above, must be divided into capital and revenue where the will or trust instrument deal with the two separately.

The complexity of the surrogate court requirements for wills or trusts results from the fee structure and the existence of conflicting interests in the estate or trust (that is, income benificiaries vs. capital interest benificiaries). The usual rule of thumb for fees for administering wills and trusts provides separate fees for each of revenue receipts, revenue disbursements, capital receipts and capital disbursements. Therefore, the account must separate these out so that the various fees

The Surrogate Courts Act (Regulations)

59. Executors, administrators, trustees under a will and guardians of infants may pass their accounts voluntarily or they may be called upon by citation to do so on the application of any person interested therein. O. Reg. 143/78, r. 59.

60.—(1) A petition and inventories and accounts duly verified by affidavits shall be filed with the registrar and thereupon the judge shall fix a time and place for the passing of the accounts.

(2) On the first passing of accounts an affidavit showing whether there has been publication of an advertisement for creditors shall be filed with the accounts.

(3) The judge shall give all necessary directions for the service of his appointment, and, if he deems it proper, for the service of a copy of the accounts, upon those interested therein including a representative of any deceased beneficiary.

(4) Where an infant is concerned, contingently or otherwise, notice shall be given to the Official Guardian who shall be informed of the name and interest of the infant and given the address of the person with whom the infant resides, and there shall also be served upon the Official Guardian a copy of the petition, the inventories and accounts duly verified by affidavits and a copy of the letters probate of the last will and testament of the deceased.

(5) Where a mentally incompetent person or a person who has been declared incapable under section 39 of the *Mental Incompetency Act*, or an absentee is concerned, contingently or otherwise, notice shall be given to his committee.

(6) Where there is no committee of such person notice shall be given to the Public Trustee who shall be informed of the name and interest and the last known address of such person and there shall also be served upon the Public Trustee a copy of the petition, the inventories and accounts duly verified by affidavits and a copy of the letters probate of the last will and testament of the deceased.

(7) The accounts shall be passed before the judge in chambers. O. Reg. 143/78, r. 60.

38.-(1) A conservator shall prepare a financial statement as of the 31st day of December in each year, showing,

(a) the assets at the beginning of the year;

(b) the assets at the end of the year;

(c) capital receipts and disbursements;

(d) revenue receipts and disbursements;

(e) the services performed by the conservator; and

(f) the compensation taken, if any.

can be calculated, claimed and verified. In administering wills and trusts, there is also a timing requirement. For instance, the fee on capital receipts cannot be claimed until an original asset has been either turned into cash or reinvested, thus the necessity of the statement showing original assets as opposed to investment.

It is the Committee's view that a passing of accounts for a conservator or attorney can be simplified. However, the development of a new scheme for accounting to the court is beyond the mandate of the Committee. The Committee has chosen to develop a financial statement that would be prepared on an annual basis by all persons who are managing at law for a person who is incapable. The Committee feels that this financial statement should meet three objectives:

1) Simple and understandable to the layperson;
2) Allow the reader to determine and follow the assets and the management of capital;
3) Reflect whether or not the person who is incapable is being maintained within his or her income, or whether capital is being depleted.

The Committee believes that the financial statement as set out in this provision will meet the need for financial information without requiring too complex a framework. The financial year would run from January 1 to December 31.

The standardization of the requirements regarding financial statements should simplify matters for all concerned. Making the contents of the financial statement mandatory without requiring that a specific form be used, should be of assistance to accountants, financial and trust institutions that use computerized accounting formats.

Notice of Financial Statement:

In the Committee's view, there is a need for a conservator, whether court appointed or statutory, to provide at least a minimum amount of financial accounting to those who have a legitimate interest in the administration of the property of a person who is incapable. There is also a community concern that a

61.—(1) The accounts shall contain a true and perfect inventory of the whole property in question, including,

(*a*) an account showing of what the original estate consisted;

(*b*) an account of all money received;

(*c*) an account of all money disbursed;

(*d*) an account of all property remaining on hand;

(*e*) a statement of compensation claimed by the executor or administrator; and

(*f*) such other accounts as the judge requires.

(2) Where principal and income are dealt with separately by the will or instrument creating any trust estate, the accounts shall be divided so as to show separately receipts and disbursements in respect of principal and income and in every other case the amounts may be so divided if the accounts of principal and income have been kept separate.

(3) Where executors, administrators, trustees or guardians have made investments of trust funds, the accounts shall show separately particulars of:

(*a*) all money so invested;

(*b*) all money received by way of repayments of or realization upon such investments in whole or in part; and

(*c*) the balance of all such investments remaining on hand. O. Reg. 143/78, r. 61.

62. Upon passing accounts, the judge may moderate any bill of costs and charges of solicitors employed by the executors, administrators, trustees, or guardians, or refer the same for taxation under the *Solicitors Act*. O. Reg. 143/78, r. 62.

63.—(1) Every order made upon passing accounts shall be made in duplicate and one of such duplicates shall be filed with the registrar who shall enter it in full in a book to be kept for that purpose.

(2) The order shall be served by registered mail or in such other manner as the judge directs upon the persons who attended or were represented at the passing of the accounts. O. Reg. 143/78, r. 63.

(2) The conservator shall, before the end of February in each year, give written notice that the financial statement for the previous year is available,

(a) to the incapable person, and to his or her guardian or attorney for personal care, if any;

(b) if the conservator is the Public Guardian and Trustee, to the persons who could apply under section 15 to replace the Public Guardian and Trustee as conservator and who have expressed a wish to receive notice;

(c) to the Public Guardian and Trustee, if he or she is not the conservator.

(3) The conservator shall, on request, give a copy of the financial statement to any of the persons referred to in subsection (2).

financial statement falling into the wrong hands may have undesirable consequences for a person incapable of managing property. Covetousness of family and strangers is not unknown. Ill motivated actions can have detrimental effects on the care and well-being of a person who is incapable. There is a tendancy among those who have no affection for a person incapable of managing to treat that person's estate as though the person were dead. To meet the need for accountability, and to avoid statements falling into the wrong hands, the requirement is that the conservator send out only a notice that a financial statement will be made available to the appropriate person on request. This will avoid the statement being open for examination, for example, in a residential care facility. The committee feels that sixty days, e.g. by the end of February, is a reasonable deadline for the provision of written notice of the availability of the previous year's statement.

In many cases, a person who is incapable would, if capable, refuse to give financial information regarding his or her affairs to anyone. In other cases, persons who become incapable would, if capable, fully disclose financial information. People vary enormously with respect to their desire for financial privacy. The policy issue is to whom a notice should be given indicating that a financial statement will be provided on request.

The persons with the greatest interest, of course, are the person incapable of managing property and a personal guardian if there is one. Decisions such as where to live largely depend on financial resources.

Consideration was given to providing the notice of availability of a financial statement to the legal dependants of the person who is incapable. It was concluded that the legal dependants who are not being supported in a reasonable manner would be able to obtain financial information in an application to the court under the Family Law Act or under the provisions pertaining to directions by the court set out in section 36. Unless they are inadequately supported, the legal dependants have no legitimate interest in knowing the details of the property of the person who is incapable.

Where the Public Guardian and Trustee is conservator, family members and friends will be entitled to apply to replace the Public Guardian and Trustee as conservator. Therefore, those persons who are

COMMITTEE'S PROPOSED LEGISLATION

(4) A person who has been given a copy of the financial statement is entitled, on request, to further particulars in respect of it.

39.-(1) The court may, on application, order that all or a specified part of the accounts of an ttorney or conservator be passed.

(2) An application to pass an attorney's accounts, whether the power of attorney is a continuing power or not, may be made by,

- (a) the attorney;
- (b) the Public Guardian and Trustee;
- (c) the guardian of the grantor of the power of attorney;
- (d) the grantor;
- (e) a judgment creditor of the grantor;
- (f) any other person, with leave of the court.

(3) An application to pass a conservator's accounts may be made by,

- (a) the incapable person;
- (b) the conservator;
- (c) the incapable person's guardian or attorney for personal care, if any;
- (d) the Public Guardian and Trustee;

COMMENTARY

sufficiently interested to request the information should be entitled to receive the financial statement so that he or she can decide whether to replace the Public Guardian and Trustee. Similarly, the Public Guardian and Trustee will be entitled to apply to the court to replace a family member or friend who is conservator and, therefore, should also be able to obtain a financial statement.

In most cases, the persons entitled to this financial information will have no interest in receiving further information. Should they desire further financial information, they should be able to obtain it. The ability to obtain further financial information is an intervening step between the requirement on the conservator to provide a passing of accounts and the minimum requirements of the financial statement. This intermediate step will permit the conservator to satisfy the inquiry and thus avoid the costs and time involved in the passing of accounts.

Passing of Accounts:

The purpose of the provisions is to permit those concerned about the financial administration of an attorney, or conservator, to have the administration reviewed by the court. The Rules of Practice make it possible to combine the application to pass accounts with applications to appoint a conservator, temporary conservator or guardian. The passing of accounts before a court, as noted earlier is a complex and expensive procedure. It is not a process to be indulged in lightly. The threat of an application for a passing of accounts should be sufficient leverage to obtain detailed financial information from the persons managing the property.

EXISTING LAW

The Powers of Attorney Act, as amended

9.—(1) Where a power of attorney contains a provision referred to in section 5 and the donor subsequently is without legal capacity, any person having an interest in the estate of the donor or any other person permitted by the court may, during such incapacity, apply to the surrogate court in the county or district where the donor or the donee resides for an order requiring the attorney to pass his accounts for transactions involving an exercise of the power during the incapacity of the donor, and the court may order the attorney to pass such accounts or such part thereof as is provided in the order.

(2) Where an order is made under subsection (1), the attorney shall file his accounts in the office of the surrogate court and the proceedings and practice upon the passing of the accounts shall be the same and of the like effect as the passing of executors' or administrators' accounts in the surrogate court.

(3) The Public Trustee may apply under subsection (1) in the same manner as a person interested in the estate of the donor where it appears to him desirable to do so in the best interests of the donor or his estate. 1979, c. 107, s. 9.

10.—(1) Where a power of attorney contains a provision referred to in section 5 and the donor subsequently is without legal capacity, any person having an interest in the estate of the donor or any other person permitted by the court may, during such incapacity, apply to the surrogate court in the county or district where the donor or the donee resides for an order substituting another person for the attorney named in the power of attorney and the court may make the order or such other order as the court considers proper.

(2) The substitution of another person for an attorney under subsection (1) shall have the like effect as the substitution of another person for a trustee under the *Trustee Act*.

(e) a dependant of the incapable person;

(f) a judgment creditor of the incapable person; or

(g) any other person, with leave of the court.

(4) The accounts shall be filed in the court office and the procedure in the passing of the accounts is the same and has the same effect as in the passing of executors' and administrators' accounts in the Surrogate Court.

(5) In an application for the passing of an attorney's accounts the court may, on motion or on its own initiative,

(a) direct the Public Guardian and Trustee to bring an application for conservatorship;

(b) suspend the power of attorney pending the determination of the application;

(c) appoint the Public Guardian and Trustee or another person to act as conservator pending the determination of the application;

(d) order an examination of the grantor of the power of attorney under section 73 to determine his or her capacity; or

(e) order that the power of attorney be terminated.

(6) In an application for the passing of a conservator's accounts the court may, on motion or on its own initiative,

(a) adjust the conservator's compensation in accordance with the value of the services performed;

(b) suspend the conservatorship pending the determination of the application;

(c) appoint the Public Guardian and Trustee

(3) The Public Trustee may apply under subsection (1) in the same manner as a person interested in the estate of the donor where it appears to him desirable to do so in the best interests of the donor or his estate.

(4) The attorney may apply under subsection (1) in the same manner as a person interested in the estate of the donor, on giving notice to the Public Trustee and to all persons having an interest in the estate of the donor. 1979, c. 107, s. 10.

The Mental Incompetency Act, as amended

13. Where a committee of the estate of a mentally incompetent person has been appointed,

(*e*) the committee shall pass his accounts from time to time at such intervals as the court may direct. R.S.O. 1970, c. 271, s. 13.

The Mental Health Act, as amended

54. The Public Trustee is liable to render an account as to the manner in which he has managed the property of a patient or an out-patient in the same way and subject to the same responsibility as any trustee, guardian or committee duly appointed for a similar purpose may be called upon to account, and is entitled from time to time to bring in and pass his accounts and tax costs in like manner as a trustee but is personally liable only for wilful misconduct. 1978, c. 50, s. 15, *part*.

or another person to act as conservator pending the determination of the application; or

(d) order that the conservatorship be terminated.

PART II

THE PERSON

40.-(1) This Part applies to decisions on behalf of persons who are at least sixteen years old.

(2) To exercise a power of decision under this Part on behalf of another person, a person must be at least sixteen years old.

41. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Minimum Age for Substitute Personal Care Decisions

Any age provision is somewhat arbitrary. The age of sixteen as the age at which a person assumes responsibility for personal care matters is well accepted in Ontario. It is the age at which a person may obtain a driver's license. It is the age where one can lawfully leave the custody of one's parents or custodian. It is the age at which doctors and hospitals will accept the personal consent of an individual to the performance of a therapeudic procedure. Until age sixteen parents and others having lawful custody of a child have authority to give consent to therapeutic procedures for a child that is incapable of giving consent.

It is important to note what the provision does and does not do. It provides that this part of the draft legislation that establishes mechanisms for substitute personal decisions applies to those who are sixteen years of age or older and who are mentally incapable. It also means that to make a decision on behalf of another person one must have attained the age of sixteen years. It does not alter the law governing decisions for persons who are capable. It does not alter the law applicable to children under sixteen.

Mentally Incapable of Personal Care:

The definition of "incapacity for personal care" is of crucial public concern. It establishes when others may assume control of personal decisions of an individual. It calls for intensive public scrutiny. The Committee has attempted to develop an approach that is principled and justifiable.

The exercise of self-determination by an individual can result in choices that are dissimilar from those that might have been made by most other members of the community. The state should not permit the use of

The Child and Family Services Act

3.—(1) In this Act,

"child" means a person under the age of eighteen years;

58.—(1) Where a child is made a society ward under paragraph 2 of subsection 53 (1), the society may consent to and authorize medical treatment for the child where a parent's consent would otherwise be required, unless the court orders that the parent shall retain any right that he or she may have to give or refuse consent to medical treatment for the child.

(2) The court shall not make an order under subsection (1) where failure to consent to necessary medical treatment was a ground for finding that the child was in need of protection.

(3) Where a parent referred to in an order made under subsection (1) refuses or is unavailable or unable to consent to medical treatment for the child and the court is satisfied that the treatment would be in the child's best interests, the court may authorize the society to consent to the treatment.

laws governing incapacity to remove the right to self-determination from an individual simply because the choices made by that individual are considered eccentric or even bizarre. For example, the choice by an individual to not have a permanent shelter or to avoid physicians must be respected. The central issue under this proposed test is whether the particular individual is capable of making a choice or decision. If the person is capable of making a choice, no interference with that choice should be permitted under the laws governing incapacity. Where a person is incapable of making a choice, the state, as protector of the rights of persons incapable of choosing, should provide for the authorization of others to make necessary choices for that person.

As noted earlier, the Committee shares the belief that people are or can be morally responsible. Responsible here is used in its sense of properly required to account. The concept of responsibility is based on two assumptions. First, that people know and understand what they do and the consequences that may arise therefrom, and second, that it is appropriate that they bear the consequences of their actions. The belief that people are or can be responsible is fundamental to our society.

The test of mentally incapable of personal care, recommended here, is both intellectual and objective. It is based on the judge-made test of capacity which is that a person is considered capable when the person can understand the nature of his or her actions or refusal to act and can appreciate the consequences of so acting or refusing to act.

The words "appreciate the reasonably foreseeable consequences" are based on the well known concept of reasonable foreseeability, a major feature of both the law of negligence and contract. They are a short form for stating that a person need only foresee consequences that can be foreseen by an ordinary person in similar circumstances.

Many kinds of decisions are irrelevant to our well being. For example, while it may be desirable to drive a vehicle in our society, mental incapacity to do so is not of such fundamental importance as to require that the state authorize the appointment of substitutes. This provision focuses on six areas of personal decision making that are of crucial importance to an individual. Under the list persons may be found mentally incapable of personal care if they are unable to make decisions related to one or more of health care, nutrition, shelter,

The Mental Incompetency Act, as amended

1. In this Act,

(*e*) "mentally incompetent person" means a person,

(i) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or

(ii) who is suffering from such a disorder of the mind,

that he requires care, supervision and control for his protection and the protection of his property;

clothing, personal hygiene or personal safety.

The Committee has considered other tests of capacity that are more objective than the proposed test. It is satisfied that the more objective tests do not correspond in any real sense to what the community would accept as a test of the capacity to make a responsible decision--a decision for which a person can be held accountable.

One of the issues that has concerned the Committee is whether the test for capacity , should incorporate the notion of "irresistible impulse" or emotional factors that may be said to govern a person's behaviour. "Irresistible impulse" may be described as a condition where a persons's cognitive or intellectual abilities measure up to the test of a responsible act, that is, he or she can appreciate the nature and consequences of an action, but emotive or volitional facets of the mental process override the judgment. Some jurisdictions accept the existence of irresistible impulse and give recognition to this phenomenon in their insanity test for criminal responsibility. Other jurisdictions reject the existence of irresistable impulse. Under Canadian law, the fact that an accused was unable to control his act does not, in itself, constitute a legal defence of insanity.

Should the test of incapacity recognize the idea that an individual may be unable to conform his behaviour to what he or she knows is the appropriate action? As a social policy, the Committee has decided that the idea of "irresistible impulse" should not be recognized in the test of mental capacity.

Applications for a finding that a person is incapable of personal care will seldom, if ever, be brought by a person to have his or her capacity removed. Irresistible impulse would only be used by others seeking to deprive the individual of self-determination and to force individuals to conform to what "reasonable persons" would do.

The Committee has also considered and rejected the test of "reasonableness" for decision making found in incapacity legislation in such jurisdictions as Alberta. It believes that a test of reasonableness of decisions will lead to encroachment on the rights of individuals to self-determination. Reasonableness as a test is the imposition of a community standard on the actions of an individual. In the Committee's view, an individual should

POWERS OF ATTORNEY FOR PERSONAL CARE

42.-(1) A person may give a written power of attorney for personal care, authorizing the person or persons named as attorneys to make on the grantor's behalf any decisions concerning the grantor's personal care that he or she could make.

(2) A power of attorney for personal care may name the Public Guardian and Trustee as attorney.

(3) A power of attorney for personal care is subject to this Part, and to the conditions that are contained in the power of attorney and are consistent with this Act.

be free to be unreasonable provided he or she can understand the nature and consequences of his or her actions.

Powers of Attorney for Personal Care:

Should a person be able to to make full preparation when he or she is mentally capable for the event of mental incapacity? Existing law does not permit the creation of an attorney for personal care. While there are potential dangers in the establishment of attorneys for personal care, the Committee believes that a system should exist whereby individuals can make provision for their mental incapacity by choosing a person to serve as an attorney for personal care. The grantor of the power should be able to create a personal power that authorizes another to make decisions in one or all areas in which he or she may become incapable. The attorney for personal care corresponds, in some respects, to the attorney over property appointed under a continuing power of attorney. The combination of the two powers would allow an individual to make total preparations for the event of his or her mental incapacity.

The greatest concern about attorneys for personal care is with respect to the potential restriction of future freedom. If inadequately safeguarded it could be a form of slavery. There are three major safeguards to the proposals. The first relates to the requirement of independent witnessing of the power of attorney for personal care; the second, to the independent assessments required before the power of attorney for personal care becomes effective; the third, to application to the Court. Because the powers to be exercised by an attorney for personal care could be coercive, the state has an interest in protecting the freedom of a grantor even from his or her own decisions.

A power of attorney for personal care, like a continuing power of attorney for property, must be witnessed by two persons who certify their opinion that the grantor is mentally capable. The power of attorney for personal care would not become effective until: two persons named in the power or two qualified professionals certified the various incapacities of the grantor, the assessment reports were given to the grantor and an attempt made to explain their contents by an advocate; and an opportunity to prevent it from coming into force was available to the grantor by objecting to the Public

COMMITTEE'S PROPOSED LEGISLATION

(4) Unless it expressly so provides, a power of ttorney for personal care does not confer uthority for the personal attorney to consent to a on-therapeutic experimental treatment or rocedure.

(5) No authority to give consent to non-herapeutic sterilization or psychosurgery as efined in section 35 of the Mental Health Act is onferred by a power of attorney for personal care.

COMMENTARY

Guardian and Trustee. The Public Guardian and Trustee may apply to court if there are doubts about the power of attorney.

The power of attorney for personal care would be of value to those who are mentally capable but who have a degenerative disease, for example, Alzheimer's disease, that will gradually render them mentally incapable. The device of appointing an attorney for personal care is integrated with the substitute decision making scheme for medical decisions (NOTE: see section 50). A person who is appointed an attorney for personal care is at the top of the list of those who may give substitute consent to medical treatment.

It is expected that the power to make medical decisions will be the aspect of the attorney for personal care legislation that is most acted upon. It gives to those persons who expect periods of mental incapacity the best possible mechanism for providing substitute decisions that are authentic.

The grantor of the power would be free to place his or her own conditions on the operations of the power of attorney. For example, the grantor might direct the attorney to consent to certain types of proposed treatment but not to other types of proposed treatement. The right to impose conditions on the attorney would give people the greatest possible self-determination.

Extent of Power:

There are limitations that exist on the ability of attorneys to comply with the directions of the grantor. Chief among these are the prohibitions relating to assisting in suicide or causing the death of an individual contained in the Criminal Code. The Criminal Code, of course, overrides the provisions contained in a personal power of attorney.

It is the Committee's view that a person when capable should be able to confer on an attorney for personal care all the powers that the court could confer on a guardian. Subsection (5) provides that no authority to consent to non-therapeutic sterilization or psychosurgery is conferred by a power of attorney for personal care. The court does not have the power to give that power to a guardian.

EXISTING LAW

(6) A power of attorney for personal care may be n the prescribed form.

(7) A power of attorney for personal care is not ffective until it is validated in accordance with ection 45 or 46.

(8) In a power of attorney for personal care, he grantor may name the persons or describe the lasses of persons who may perform an assessment of is or her capacity for personal care if it is in ssue.

Prescribed Form:

A form should be established under the regulations for a power for personal care but the form should not be a mandatory form. The usual powers would be those set out in a full guardianship order [see subsection 60(2)].

In the prescribed Form there would be provision for the term of the attorney to be limited by the grantor. The time would run from the point at which the grantor was certified as mentally incapable of performing one or more of the personal care functions. There should also be provision for the grantor of the power to set out the grantor's intentions with respect to the use of the personal power. The grantor could specifically authorize the attorney to have the power to consent to those procedures that would otherwise be excluded.

If the standard form meets the needs of those who attempt to use it, there will be public benefit. It is likely that the commercial form printers will make these forms readily available. However, the prescribed form is not made mandatory. People are free to develop powers of attorney for personal care that more accurately reflect their personal intentions, without running the risk of making a document that will not be enforcible.

Need to Validate the Power:

Subsection (7) provides a major safeguard to the power of attorney for personal care. Unlike the power of attorney for property (see section 7), the power of attorney for personal care does not confer on the attorney the authority to act while the grantor of the power is mentally capable. For the power of attorney for personal care to take effect it must be validated by the process set out in section 45 or 46.

Subsection (8) gives the grantor of the power the right to name the persons or the classes of persons that he or she wishes to determine whether he or she has become mentally incapable when the issue arises. A person might choose individuals who have known him or her for some period of time and would have nothing to gain or lose by the determination. In the case of a person who was eccentric this power would allow the individual's ordinary peculiarities to be taken into account by someone who is aware of them, rather than the certification being done by a professional who knows nothing about him or her. For

COMMITTEE'S PROPOSED LEGISLATION

3. A person may, in a power of attorney for
onal care, designate the person, including the
c Guardian and Trustee, whom he or she wishes
court to appoint as guardian in the event of
or her incapacity for personal care.

4.-(1) A power of attorney for personal care
l be executed in the presence of two witnesses
he manner described in subsection (3).
2) The persons described in subsection 9(2)
tinuing power of attorney for property, persons
shall not be witnesses) shall not be witnesses.
3) Each witness shall sign the document as
ess and shall at the same time make a written
ement in the prescribed form indicating that,
is or her opinion, at the time of executing the
r the grantor was capable of personal care.

COMMENTARY

example, an individual might name the deacon of the church that is regularly attended or a friend. The danger is that the individual selected may decline to perform the assessment and, therefore, it would be advisable for an individual who is selecting persons to perform an assessment to discuss the issue with the persons selected before the issue arose.

Preferred Guardian:

Section 43 permits a grantor to designate the person whom he wishes the court to appoint as his or her guardian in the event of incapacity. While doing so does not avoid the public process of a determination of capacity by the court, it would assure an individual that someone in whom he or she has confidence is the first choice as guardian.

Witnessing:

The Committee recommends that the witnessing of a power of attorney for personal care should be identical to the witnessing of a continuing power of attorney over property. To do otherwise would be to create confusion and the possibility of mistake.

Two witnesses are required. The following persons are excluded from being witnesses:

(1) The proposed attorney or his or her spouse;

(2) The grantor's spouse;

(3) A person who is related to the grantor or the attorney by blood, adoption or marriage or whom the grantor or the attorney has demonstrated a settled intention to treat as his or her spouse as child;

(4) An owner, manager, agent or employee of the facility at which the grantor receives board or other personal care;

(5) A person who is a party to litigation to which the grantor is a party; or

(6) A person who has a conservator of his or her property or a guardian.

EXISTING LAW

45.-(1) The attorney under a power of attorney For personal care may apply to the Public Guardian nd Trustee to validate the power of attorney.

(2) At the time of making the application, the attorney shall file with the Public Guardian and Trustee copies of the power of attorney and of the statements described in section 47, and a guardianship plan in the prescribed form.

(3) An advocate shall promptly visit the grantor nd shall,

(a) notify the grantor of the attorney's application and of the statements described in section 47;

(b) explain to the grantor what powers the attorney will have if the power of attorney is validated;

(c) inform the grantor of his or her right to oppose the validation of the power of attorney.

(4) The advocate shall promptly notify the Public Guardian and Trustee in writing that the visit took place and whether the grantor opposes the validation of the power of attorney.

The witnessing requirement requires that the witnesses to a power of attorney for personal care give individual statements indicating that they are satisfied the grantor is capable of personal care. The role of the witness as a safeguard is vitally important in connection with attorneys for personal care. Where a statement in the prescribed form indicating fact or opinion is given by a person under this Act, like an affidavit, the fact or opinion can be evidence in a court and may be the subject of cross-examination. The form will be designed to impress on the witnesses the gravity of their roles.

Filing with Public Guardian:

To validate a power of attorney for personal care naming someone other than the Public Guardian and Trustee as attorney, application must be made to the Public Guardian and Trustee.

The attorney for personal care would be required to file a copy of the assessment statements, the power of attorney, and a guardianship plan with the Public Guardian and Trustee. The Public Guardian and Trustee would then arrange for an advocate to visit the grantor.

Explanation by an Advocate:

The effects and significance of the assessment statements would be explained by an advocate trained and experienced in working with persons of diminished capacity. Of course, in some cases, the incapacity would be to such a degree that an explanation would not be understood. The right to oppose the process would also be explained. The advocate would then give the Public Guardian and Trustee a written statement certifying that the visit and explanation has taken place and whether or not the grantor opposed the process.

COMMITTEE'S PROPOSED LEGISLATION

(5) If the grantor does not oppose the validation of the power of attorney, the Public Guardian and Trustee may validate it by issuing a certificate and may in the certificate impose such limits on the attorney's powers as the Public Guardian and Trustee considers appropriate.

(6) The certificate shall state in respect of which functions described in section 41 (personal care) the grantor is incapable, in the opinion of the makers of the statements described in section 47, and the validation applies only to the powers of the attorney that correspond to those functions.

(7) If the Public Guardian and Trustee refuses o validate the power of attorney and the attorney isputes the refusal, the Public Guardian and rustee shall apply to the court to decide the atter.

(8) The court may make an order validating the ower of attorney and may in the order impose such imits on the attorney's powers as it considers ppropriate.

(9) If the Public Guardian and Trustee validates e power of attorney but the attorney disputes the imits imposed on his or her powers or the tatement referred to in subsection (6), the Public uardian and Trustee shall apply to the court to ecide the matter.

COMMENTARY

Certificate of Validation:

If the Public Guardian and Trustee did not receive an objection from the grantor and if the material filed was in order, the Public Guardian and Trustee would issue a certificate of validation. This certificate would activate the power of attorney for personal care, allowing the attorney to act on it. The certificate would set out the powers of the attorney that were in force based on the assessments. The Public Guardian and Trustee's refusal to issue a certificate or refusal to validate powers requested by the attorney, if disputed by the attorney, would lead to the Public Guardian and Trustee's application to the court to settle the matter.

Powers conferred on the attorney for personal care would be based on the assessment statements. If the grantor is incapable of all personal care functions, the attorney would be authorized to exercise the authority conferred by the power of attorney for personal care. If the grantor is incapable of only some personal care functions, the attorney's authority would be limited to substitute decisions governing those functions.

There is a major exception to the requirement of these assessments before the coming into force of powers under the power of attorney for personal care. That exception is set out in section 50 which deals with substitute consent to psychiatric and medical treatment. Its effect is that where a person has created a power of attorney for personal care and a physician is of the opinion that the grantor of the power who is his or her patient does not have mental capacity to consent to treatment, the attorney has the right to consent or refuse consent.

EXISTING LAW

COMMITTEE'S PROPOSED LEGISLATION

(10) The court may amend the certificate as it considers appropriate.

46.-(1) If the attorney under a power of attorney for personal care is the Public Guardian and Trustee, this section applies instead of section 45.

(2) When the Public Guardian and Trustee wishes to validate the power of attorney, he or she shall file in his or her office copies of the power of attorney and of the statements described in section 47.

(3) Subsections 45(3) and (4) (advocate to visit grantor, notice to Public Guardian and Trustee) apply with necessary modifications.

(4) If the grantor does not oppose the alidation of the power of attorney, the Public uardian and Trustee may validate it by issuing a ertificate.

(5) The certificate shall state in respect of hich functions described in section 41 (personal are) the grantor is incapable, in the opinion of he makers of the statements described in section 7, and the validation applies only to the powers f the attorney that correspond to those functions.

COMMENTARY

Validation of Public Guardian and Trustee as Attorney:

Section 46 provides a slightly different procedure if the Public Guardian and Trustee is to be the attorney for personal care under the power of attorney. The assessments of the mental capacity of the grantor, the visit of the advocate to advise the grantor of the effects of validation and the grantor's right to prevent the validation, the major safeguards of the process, are still required.

EXISTING LAW

COMMITTEE'S PROPOSED LEGISLATION

47.-(1) If the attorney under a power of attorney for personal care intends to apply under subsection 45(2) (validation) or if the Public Guardian and Trustee wishes to validate a power of attorney for personal care naming him or her as attorney, the following persons may each perform an assessment of the grantor's capacity:

1. Two of the persons named or described in the power as preferred assessors.
2. If the power does not name or describe preferred assessors, or if there are not two of them who are able and willing to perform an assessment, a physician and a psychiatrist, a second physician, a psychologist or a social worker.

(2) If a person who performs an assessment concludes that the grantor is incapable in respect of the functions described in section 41 (personal care), or in respect of some of them, he or she shall make a statement, in the prescribed form, and shall give it to the attorney.

COMMENTARY

Assessment of Capacity of Grantor:

A major difference between a continuing power of attorney for property and a power of attorney for personal care is when the attorney under each is authorized to act. Under a continuing power of attorney the attorney for property may act at any time after it is given, unless specifically directed by the grantor not to act or unless a condition is in place otherwise governing the power. The power of attorney for personal care comes into force only after the occurrence of two independent assessments of the grantor's capacity and the issuance of a certificate of validation by the Public Guardian and Trustee.

At first, the Committee felt that assessments should be conducted by professionals trained to perform such procedures. However, a power of attorney is a voluntary assignment of authority. Grantors should be able to name persons they trust to carry out the duty. Subsection 42(8), therefore, allows grantors to designate persons whom they want to assess their capacity, in order to trigger the power of attorney for personal care. Where designations are not made or those named are unable to unwilling to make an assessment, two professionals must assess the grantor after personal examination.

Paragraph 47(1)2 provides that one professional assessor must be a physician. The other can be a psychiatrist, psychologist, certified social worker or another physician, provided the professional certifies in writing that he or she is qualified to do an assessment of mental capacity. These stipulations ensure that a thorough medical and psychological examination is performed, where a professional assessment is done.

Assessment statements are given to the attorney by the assessors. The option of naming an attorney for personal care will only become a reality in many cases if the proper funding for the performance of assessments is available from the government.

EXISTING LAW

(3) The statement shall indicate that its maker is of the opinion that the grantor is incapable in respect of the functions described in section 41, or in respect of some of them, shall specify the nature and extent of the incapacity and shall set out the facts on which the opinion is based.

(4) If the maker of the statement is a psychiatrist, a second physician, a psychologist or a social worker, he or she shall certify in the statement that he or she is qualified to perform assessments of capacity.

48.-(1) A power of attorney for personal care is terminated,

(a) when the attorney dies, becomes incapable or resigns, if the power does not provide for the substitution of another person or if no such person is able and willing to act;

(b) when the court appoints a guardian under section 54;

(c) when the power is revoked.

(2) A revocation shall be in writing and shall be executed in the same way as a power of attorney for personal care.

Termination:

The actions taken by attorneys for personal care, like the actions taken by attorneys under continuing powers of attorney for property, are reviewable by the courts. Thus, if there is concern about the use of the powers by an attorney, an application may be brought for the appointment of a guardian by the court. Appointment of a guardian would terminate the power of attorney for personal care. If a serious issue arises the Public Guardian and Trustee is authorized under section 63 to apply to the court for temporary guardianship.

An important method of terminating a power of attorney for personal care is by the grantor's revocation. To revoke, the same procedure and the same requirements will apply for revocation as for its creation. Two witnesses are required to the revocation who will each make a statement certifying that the grantor was capable of personal care when the revocation was executed.

It would be legally possible for a grantor to revoke the power of attorney even after he or she was assessed as mentally incapable of performing certain aspects of personal care. There will be situations where the grantor's mental incapacity was of a temporary nature and capacity has returned. The Committee considered but rejected the concept of requiring a further assessment of capacity before a grantor who had been certified as mentally incapable of personal care could terminate a power of attorney for personal care. It felt such an approach was cumbersome and unnecessary. If two witnesses to the revocation are of the opinion that the grantor of the power is mentally capable, that is sufficient to terminate the power.

The power of attorney for personal care is also terminated by the death, mental incapacity or resignation of the attorney for personal care, unless the grantor of the power has provided for the substitution of other attorneys in the document.

CONSENT TO PSYCHIATRIC AND MEDICAL TREATMENT

Existing Law:

Physicians run the risk of liability for battery or negligence if they provide treatment to those whose ability to give an informed consent to such treatment is impaired by mental infirmity. The common law does not recognize a right in any individual (such as a close relative of the patient) to give a legally valid consent to treatment for another. Statute law in Ontario only provides substitute consent for "psychiatric treatment" given to patients under the Mental Health Act. At the present time, the only procedure available for procuring substitute consent is to have the patient declared mentally incompetent under the Mental Incompetency Act and to obtain the consent of a court appointed committee of the person.

Sections 50, 51 and 52 of O. Reg. 865 under the Public Hospitals Act provide the requirement of obtaining written consent from a patient or substitute consent from parents or next of kin for surgical operations and diagnostic tests. It would seem, however, that these provisions do not protect the doctor from liability for battery or negligence for not obtaining informed consent to the treatment. Nevertheless, the provisions are relied upon and "work" in that surgical operations are performed in hospitals. This section states:

> 50. No surgical operation shall be performed on a patient or an out-patient unless a consent in writing for the performance of the operation has been signed by,

(a) the patient or out-patient, as the case may be, where the patient or out-patient is

(i) sixteen years of age or over, or
(ii) married;

(b) a parent, guardian or next-of-kin of the patient or out-patient, as the case may be, where the patient or out-patient is unmarried and under sixteen years of age; or

(c) the spouse, or apparent guardian, or next-of-kin of the patient or out-patient, as the case may be, where the patient or out-patient is unable to consent in writing by reason of mental or physical disability,

but where the surgeon believes that delay caused by obtaining the consent would endanger the life or limb or vital organ of the patient or out-patient, as the case may be,

(d) consent is not necessary;

(e) the surgeon shall write and sign a statement that a delay would endanger the life or limb or vital organ, as the case may be, of a patient or out-patient.

51. Where the attending physician or the administrator is of the opinion that a consent, in writing, should be obtained before a diagnostic test or medical procedure is performed on a patient or an out-patient, such consent shall be signed by,

(a) the patient or out-patient, as the case may be, where the patient or out-patient is,

(i) sixteen years of age or over, or
(ii) married;

(b) a parent, guardian or next-of-kin of the patient or out-patient, as the case may be, where the patient or out-patient is unmarried and under sixteen years of age;

(c) a spouse or a parent, guardian or next-of-kin of the patient or out-patient, as the case may be, where the patient or out-patient is unable to consent in writing by reason of mental or physical disability.

52.(1)Notwithstanding sections 50 and 51, no surgical operation for the purpose of rendering a patient or out-patient incapable of insemination or of becoming pregnant shall be performed where the patient or out-patient is under the age of sixteen years.

(2)Subsection 1 does not apply where the surgeon or the attending physician believes that the surgical operation is medically necessary for the protection of the physical health of the patient or out-patient.

The Policy Issue:

The existing law of informed consent results in medical and psychiatric treatment decisions being a crisis for those involved in the care of the mentally disadvantaged. A person breaks an arm, individuals have callouses that prevent them from walking, tonsils become infected. At present, the Public Hospitals Act regulations are relied on to avoid applications under the Mental Incompetency Act. For years, a major reason for bringing applications to have a committee of the person (guardian) appointed under that Act has been the need to obtain consent to treat a person who has no next of kin. The most common reason for having a guardian appointed in Alberta under the Dependant Adults Act is the need to obtain consent to medical treatment.

The central policy issue that the Committee has addressed in considering substitute consent to medical and psychiatric treatment is whether it is better to provide for a near relative to consent to treatment for a person whom a physician believes is incapable of giving consent, or to provide that only emergency treatment be given without the consent of a court appointed guardian. The Committee considered and rejected the option of dipensing with consent for treatment of a mentally incapable person when two or more physicians provide a written opinion that the treatment is needed and therapeutic. The providers of services should not be asked to determine the value of their services to the life of an individual.

In coming to a decision, the Committee considered the issue from a number of perspectives. It considered the question of intrusiveness. Consent given by a near relative under a statute would be less disruptive to an individual's life and less intrusive than a court application. If a court application is brought the muli-disciplinary assessment could reveal that the individual lacked more than the capacity to make health care decisions. The time and expense of the application to the court would result in a philosophy of "while we are here why not ask the court for the power to...", whether or not those types of powers were needed.

Significant costs would be incurred by the estate of the person who is incapable and by the state on behalf of those without assets. The state might need to provide additional courts to deal with these issues or there would be a substantial backlog in decisions. Where some benefit would result to the person, those expenses are warranted. But in the ordinary case of routine therapeutic treatment this would not be the case. Near relatives or close friends or the Public Guardian and Trustee would apply for and obtain a guardianship order. These would be the very same persons that could be authorized by statute to give or refuse substitute consent.

The frequency of these routine court applications, their volume, and their similarity would likely result in a less careful examination of cases where serious issues were involved.

These considerations force the Committee to devise a substitute consent approach to medical and psychiatric treatment that would result in only controversial matters being taken to the courts. In developing its proposals, the Committee has attempted to avoid the problems that have arisen in connection with statutory substitute consent laws in Ontario and other jurisdictions.

These provisions are intended to replace sections 50 and 51 of the regulations under the Public Hospitals Act as they apply to adults incapable of giving or refusing consent to treatment. They are intended also to apply to voluntary patients of psychiatric facilities under the Mental Health Act who are mentally incapable of consenting to or refusing treatment. This Report does not directly address issues related to substitute consent for involuntary patients of those facilities. Another area that was beyond the mandate of the Committee that is in need of examination is the law governing informed consent of mentally capable persons.

The provisions related to substitute consent to psychiatric and medical treatment are not restricted to any place, but are intended to apply wherever the issues arise. They would, for example, apply equally in a public hospital or in a community medical clinic. The provisions do not provide for substitute decisions with respect to treatment by other health care professionals. The Committee was of the opinion that, at present, there are not a sufficient number of problems experienced by persons who are disadvantaged in consenting or refusing consent to these health services in the community to warrant special provisions. A guardian appointed by the court could have

COMMITTEE'S PROPOSED LEGISLATION

49. In this section and sections 50 to 53,

eatment" means a psychiatric or medical treatment or procedure;

capable" means incapable of personal care, as described in section 41, in respect of health care.

50.-(1) If a treatment which cannot be inistered without consent is recommended for a son who is, in the attending physician's nion, incapable, consent may be given or refused that person's behalf by a person who is cribed in one of the following paragraphs and could consent to treatment on his or her own alf:

1. A guardian who has authority to consent to treatment on the incapable person's behalf, or an attorney for personal care under a power that confers that authority and has been validated in that respect under section 45 or 46.
2. An attorney for personal care under a power that confers that authority but has not been validated.
3. The incapable person's spouse.
4. The incapable person's child.
5. The incapable person's parent.
6. The incapable person's brother or sister.
7. Any other relative of the incapable person.
8. The incapable person's friend.

COMMENTARY

authority to consent or refuse consent to all health related services for a person who is mentally incapable of personal care.

Substitute Consents:

These provisions apply "where consent is required for treatment". Under judge-made law, consent is required where a touching of another is involved. Consent may be implied from actions by a patient, for example, by attending at an office for an examination. Consent may be oral or it may be written. A prime reason for written consent is to have evidence that consent was given.

The Committee considered and rejected the idea of revising the law of informed consent as it applies to medical treatment. That law applies to those who are both mentally capable and mentally incapable of consenting to treatment. Most important, while that law is in need of statutory revision, the composition of the Committee was inappropriate to the task. Therefore, the judge-made law has been left unchanged and provisions for substitute decision-making are based on that judge-made law.

Section 50 sets out the order of priority of persons who may consent or refuse consent to treatment on behalf of a person who is apparently mentally incapable.

In the first group is a court appointed guardian and an attorney whose authority has been validated by the Public Guardian and Trustee (see sections 45 and 46 for a better appreciation of the validation process).

The second priority is given to an attorney for personal care who has been appointed by the grantor whose authority has not been validated. If these provisions are implemented a person when capable could using the power of attorney for personal care select a substitute decider that would in effect be his or her first choice to make decisions in the event of a subsequent incapacity.

EXISTING LAW

The Mental Health Act, as amended by Bill 190

2. The said Act is amended by adding thereto the following sections:

1a.—(1) A person may give or refuse consent on behalf of a patient who is not mentally competent if the person has attained the age of sixteen years, is apparently mentally competent, is available and willing to give or refuse consent and is described in one of the following paragraphs:

1. The committee of the person appointed for the patient under the *Mental Incompetency Act.*
2. The patient's representative appointed under section 1b or 1c.
3. The person to whom the patient is married or the person of the opposite sex with whom the patient is living outside marriage in a conjugal relationship or was living outside marriage in a conjugal relationship immediately before being admitted to the psychiatric facility, if in the case of unmarried persons they,
    - i. have cohabited for at least one year,
    - ii. are together the parents of a child, or
    - iii. have together entered into a cohabitation agreement under section 53 of the *Family Law Act, 1986.*
4. A child of the patient.
5. A parent of the patient or a person who has lawful custody of the patient.
6. A brother or sister of the patient.
7. Any other next of kin of the patient.
8. The Official Guardian.

COMMITTEE'S PROPOSED LEGISLATION

(2) If two or more persons who are described in ifferent paragraphs of subsection (1) claim the uthority to give or refuse consent, the claim of he person who is described in the earlier aragraph prevails.

(3) The attending physician shall make easonable inquiry as to the existence of persons escribed in subsection (1) and shall determine who laims the authority to give or refuse consent.

(4) If, after a reasonable inquiry, no person escribed in subsection (1) is found who claims the authority to give or refuse consent,the Public Guardian and Trustee may give or refuse consent.

(5) If two or more persons described in the same paragraph of subsection (1) claim the authority to give or refuse consent and disagree about whether to give or refuse consent, and if their claims would prevail over any other claims, the Public Guardian and Trustee may give or refuse consent.

COMMENTARY

Where an individual has not made a power of attorney for personal care, paragraphs 3 to 8 are an informed guess at the order in which most people would call upon their relatives and friends to make a substitute decision for them. Relations between spouses and within families are not always friendly. To avoid substitute decisions by those whom the person who is incapable would not want, the person claiming the right to make the decision must declare, in writing, that he or she has no reason to believe that the person for whom the decision is being made would object to his or her making the decision.

This subsection establishes the priority of the classes appearing earlier in the list to claim to make the substitute decision. It also has the effect of avoiding the possibility of a search for more remote relatives willing to make a decision that those nearer to a person who is mentally incapable would not make.

A duty is imposed on the physician, and through the physician on those answerable to him or her, to make reasonable inquiry as to the existence of the persons who might make a substitute decision and to explain the right to do so.

If no person is found who claims the authority to make the treatment decision the Public Guardian and Trustee is the residual substitute. The Public Guardian and Trustee will need the resources to obtain relevant information both medical and otherwise in difficult cases.

If there is more than one person who shares the highest priority to make a substitute decision on behalf of a person who is incapable and those people cannot agree on a course of action, this provision removes right to decide from them and confers it on the Public Guardian and Trustee. Under appropriate circumstances where there is no urgent need for a medical decision, the parties who are in disagreement can make an application to the court for guardianship. The court can then decide who the guardian should be.

EXISTING LAW

(2) If a person in a category in subsection (1) refuses consent on the patient's behalf, the consent of a person in a sub sequent category is not valid.

(3) If two or more persons who are described in different paragraphs of subsection (1) claim the authority to give or refuse consent on behalf of a patient, the claim of the person who is described in the paragraph occurring first in that subsection prevails.

(4) If two or more persons who are described in the same paragraph of subsection (1) claim the authority to give or refuse consent on behalf of a patient, if they disagree about whether to give or refuse consent and if their claims would prevail over any other claims under subsection (3), the refusal prevails.

(5) A person described in paragraph 3, 4, 5, 6 or 7 of subsection (1) may not give or refuse consent on a patient's behalf unless the person makes a statement in writing certifying.

(a) the person's relationship to the patient;

(b) that the person has been in personal contact with the patient over the preceding twelve month period;

(c) that the person is willing to assume the responsibility for consent or refusing consent; and

(d) that the person is not aware of any other person described in the same paragraph or in a previous paragraph who claims the authority to give or refuse consent.

(6) A person authorized to give or refuse consent on behalf of a patient shall do so in accordance with the wishes of the patient if the person knows that the patient expressed any such wishes when apparently mentally competent and in accordance with the best interests of the patient if the person does not know of any such wishes.

(7) A person who seeks another person's consent on a patient's behalf is entitled to rely on the accuracy of the other person's written statement under subsection (5), unless it is not reasonable to do so.

(8) A person seeking consent on behalf of a patient is not liable for failing to request the consent of another person entitled to give or refuse consent on behalf of the patient if, after reasonable inquiries, the person did not find the other person.

COMMITTEE'S PROPOSED LEGISLATION

(6) A person who assumes responsibility for giving or refusing consent to treatment on the incapable person's behalf is entitled to receive all the information concerning the incapable person and the proposed treatment that is necessary for an informed consent.

(7) A person described in paragraph 3, 4, 5, 6, 7 or 8 of subsection (1) shall not give or refuse consent to treatment on the incapable person's behalf unless the person makes a written statement in the prescribed form indicating that he or she,

(a) has been in personal contact with the incapable person during the preceding twelve months and has a friendly relationship with the incapable person;

(b) believes that the incapable person does not object to him or her making the decision;

(c) will act in accordance with subsections 69(1), (3), (4) and (5) (duty of guardian) as if he or she were the incapable person's guardian; and

COMMENTARY

A person who claims authority to make the substitute decision is required to make certain statements before he or she can make a substitute decision. It should be noted that a guardian and an attorney for personal care are exempted from this requirement: the guardian because he or she has been appointed by the court after a process that has determined his or her suitability; the attorney for personal care because he or she has been selected by the patient to make such decisions.

The first requirement placed on those claiming authority is that they attest to being in friendly personal contact during the preceding twelve months. Friendly contact is chosen because spouses and relatives may not have had that kind of relationship. Twelve months is an arbitary period but an absence of contact longer than that indicates that the degree of personal awareness of the needs and wishes of the person for whom a decision is being made may be lacking.

The second requirement goes to the heart of the matter. Would the patient object to you making the decision for him or her?

Section 69 sets out the duties that apply to guardians and to attorneys under powers of attorney for personal care. Not all of those duties are appropriate to treatment decisions that may be only a one shot effort. However, some of those duties are appropriate. The substitute must act diligently and in good faith. By diligence we mean that a person making a substitute decision for another must inquire about the treatment and non-treatment choices so that informed consent or informed refusal can be given. Also, the substitute owes the incapable person the duty of diligence in the sense that a decision is made before the health of the patient deteriorates.

EXISTING LAW

1b.—(1) A person who has attained the age of sixteen years and is mentally competent to do so has the right to appoint a representative who has attained the age of sixteen years and is apparently mentally competent to give or refuse consent on behalf of the person for the purpose of paragraph 2 of subsection 1a (1).

(2) An appointment of a representative shall be made in writing in the presence of a witness.

(3) An appointment may be subject to such conditions and restrictions, if any, as are contained in it and not inconsistent with this Act.

(4) The attending physician shall inform the patient in writing of the patient's right under subsection (1) within forty-eight hours after the patient is admitted or registered to the psychiatric facility.

(5) As soon as practicable, the officer in charge shall inform all persons who are patients of the facility at the time of the coming into force of this section in writing of their rights under subsection (1).

(6) The notice shall be in the form prescribed by the regulations and shall inform the patient of the powers and responsibilities of a representative under this Act.

(7) If a patient gives or transmits to the officer in charge a statement in writing appointing a representative, the officer in charge shall transmit the statement to the representative forthwith.

(8) A person who has appointed a representative may revoke in writing the appointment and may appoint in writing a new representative while mentally competent to do so, and subsection (7) applies with necessary modifications in respect of the revocation and new appointment.

1c.—(1) A patient who has attained the age of sixteen years, is not mentally competent to appoint a representative and has not named a representative under section 1b, has the right to apply to the board for the appointment of a representative requested by the patient to give or refuse consent on behalf of the patient for the purpose of paragraph 2 of subsection 1a (1).

(2) An attending physician who determines that a patient is not competent to appoint a representative shall as soon as practicable inform the patient in writing of the patient's right under subsection (1).

(3) The notice shall be in the form prescribed by the regulations and shall inform the patient of the powers and responsibilities of a representative under this Act.

COMMITTEE'S PROPOSED LEGISLATION

(d) is satisfied that there is no person described in an earlier paragraph of subsection (1) who claims authority to give or refuse consent to treatment.

(8) This section does not authorize a person to
ve consent on an incapable person's behalf to
-therapeutic sterilization, psychosurgery as
ined in section 35 of the Mental Health Act, or
on-therapeutic experimental treatment or
cedure.

COMMENTARY

Where it is possible to do so, the substitute has a duty to make an authentic decision, that is the decision that the individual him or herself would have made in the circumstances of the patient were mentally capable. Where there is not a clear idea of what the patient would have done, the substitute owes the patient a duty to make a decision for his benefit. These duties are identical to those imposed upon a guardian and an attorney for personal care. If a person who would otherwise qualify as a substitute cannot perform this duty, he or she is not an appropriate substitute. The final responsibility that is imposed on a substitute is the duty to encourage the patient to participate in the decision-making process. At a minimum this would require the substitute, where it was feasible to do so, to determine what wishes, if any, the patient has.

The final statement required of the person claiming authority to decide on behalf of another is that he or she knows of no other person of higher priority who would claim authority to consent or refuse consent to treatment. The question does not only seek others with higher priority. Undoubtedly those who are making reasonable inquiry to determine whether there are possible claimants would have sought them out. The question is designed to obtain the substitute that is closest to the patient.

Certain types of treatment may not be consented to by a statutory substitute. Under this draft legislation, there is no provision for anyone authorizing non-therapeutic sterilization, psychosurgery or a non-therapeutic experimental treatment or procedure.

EXISTING LAW

(4) The patient, the person proposed as a representative, the person who would be authorized under subsection 1a (1) to consent on behalf of the patient if no order is made by the board under this section and such other persons as the board may specify are parties to a proceeding before the board under this section.

(5) The board shall appoint a person as a representative for a patient only if the patient approves of the appointment and the board is satisfied that the person,

(a) has attained the age of sixteen years;

(b) is apparently mentally competent to give or refuse consent on behalf of the patient;

(c) consents to the appointment; and

(d) in the board's opinion it is in the patient's interest to appoint the person as a representative.

(6) The board may appoint a person other than the person requested by the patient to be the patient's representative.

(7) An appointment made by the board may be subject to such conditions and restrictions, if any, as are approved by the patient, set out in the appointment and not inconsistent with this Act.

1d.—(1) A person who has not attained sixteen years of age is presumed to be not mentally competent to consent for the purposes of this Act.

(2) The presumption that a person is not mentally competent is subject to a determination by the attending physician, the review board or a court, pursuant to subsection 29a (14), section 35 or 35b, that the person is mentally competent.

11. Section 35 of the said Act, as amended by the Statutes of Ontario, 1986, chapter 64, section 33, is repealed and the following substituted therefor:

35.—(1) In this section and in sections 35a, 35b and 35c,

(a) "electroconvulsive therapy" means the procedure for the treatment of certain mental disorders that induces, by electrical stimulation of the brain, a series of generalized convulsions;

(b) "having the ability to understand the subject matter in respect of which consent is requested" in the definition of "mentally competent" means having the ability to understand the nature of the illness for which treatment is proposed and the treatment proposed; and

COMMITTEE'S PROPOSED LEGISLATION

COMMENTARY

EXISTING LAW

(c) "psychosurgery" means any procedure that, by direct or indirect access to the brain, removes, destroys or interrupts the continuity of histologically normal brain tissue, or which inserts indwelling electrodes for pulsed electrical stimulation for the purpose of altering behaviour or treating psychiatric illness, but does not include neurological procedures used to diagnose or treat organic brain conditions or to diagnose or treat intractable physical pain or epilepsy where these conditions are clearly demonstrable.

(2) Psychiatric and other related medical treatment shall not be given to a patient,

(a) where the patient is mentally competent, without the voluntary, informed consent of the patient;

(b) where the patient is not mentally competent,

(i) without the consent of a person authorized by section 1a to consent on behalf of the patient,

(ii) unless the review board has made an order authorizing the giving of the specified psychiatric and other related medical treatment, or

(iii) unless a physician certifies in writing that there is imminent and serious danger to the life, a limb or a vital organ of the patient requiring immediate treatment and the physician believes that delay in obtaining consent would endanger the life, a limb or a vital organ of the patient.

(3) Subclause (2) (b) (iii) only authorizes the giving of such treatment as is necessary to preserve the life, a limb or a vital organ of the patient.

(4) The consent to psychiatric and other related medical treatment,

(a) of an involuntary patient; or

(b) of a person authorized by this Act to consent on behalf of a patient,

does not include and shall not be deemed to include psychosurgery.

(5) A person authorized to give or refuse consent on behalf of a patient shall consider the following factors to determine whether a specified psychiatric treatment and other related medical treatment are in the best interests of a patient,

(a) whether the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;

COMMITTEE'S PROPOSED LEGISLATION

COMMENTARY

EXISTING LAW

(b) whether the mental condition of the patient will improve or is likely to improve without the specified psychiatric treatment;

(c) whether the anticipated benefit from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient; and

(d) whether the specified psychiatric treatment is the least restrictive and least intrusive treatment that meets the requirements of clauses (a), (b) and (c).

12. The said Act is further amended by renumbering section 35a, as enacted by the Statutes of Ontario, 1986, chapter 64, section 33, as section 35d and by adding thereto the following sections:

35a.—(1) The attending physician of an involuntary patient may apply to the review board for an order authorizing the giving of specified psychiatric and other related medical treatment to the patient where the patient is not mentally competent,

(a) if a person authorized under section 1a to consent to such treatment on the patient's behalf has refused to consent; or

(b) under the circumstances described in subsection 1a (4).

(2) The review board shall not consider an application unless it is accompanied by statements signed by the attending physician and a psychiatrist who is not a member of the medical staff of the psychiatric facility, each stating that they have examined the patient and that they are of the opinion that,

(a) the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;

(b) the mental condition of the patient will not improve or is not likely to improve without the specified psychiatric treatment;

(c) the anticipated benefit from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient; and

(d) the specified psychiatric treatment is the least restrictive and least intrusive treatment that meets the requirements of clauses (a), (b) and (c).

(3) Each of the opinions in the statements described in subsection (2) shall be supported with reasons.

(4) The review board by order may authorize the giving of the specified psychiatric and other related medical treatment if it is satisfied that,

(a) the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;

(b) the mental condition of the patient will not improve or is not likely to improve without the specified psychiatric treatment;

(c) the anticipated benefit from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient; and

(d) the specified psychiatric treatment is the least restrictive and least intrusive treatment that meets the requirements of clauses (a), (b) and (c).

(5) An order may include terms and conditions and shall specify the period of time during which it is effective.

(6) No order of the board is or shall be deemed to be authority to perform psychosurgery or to administer electroconvulsive therapy.

(7) The attending physician, the patient and such other persons as the review board may specify are parties to the proceedings before the review board.

(8) Where the patient is not mentally competent,

(a) the person authorized under section 1a to consent on the patient's behalf; or

(b) under the circumstances described in subsection 1a (4), all of the persons described therein,

are also parties to the proceedings.

(9) The officer in charge shall notify the Official Guardian forthwith after an application is made under this section or section 35b in respect of a patient determined to be not mentally competent to consent to psychiatric and other related medical treatment where it appears to the officer in charge that the patient will not be represented at the forthcoming hearing.

(10) Upon receiving a notice under subsection (9), the Official Guardian shall represent the patient at the hearing of the application unless the Official Guardian is satisfied that another person will represent the patient.

(11) Where a party appeals an order authorizing the providing of specified psychiatric and other related medical treatment or a specified course of psychiatric and other related

COMMITTEE'S PROPOSED LEGISLATION

51.-(1) When consent to treatment has been given r refused on an incapable person's behalf by a erson described in paragraph 2, 3, 4, 5, 6, 7 or 8 f subsection 50(1), an advocate shall visit the ncapable person.

(2) If consent has been given, the visit shall ake place before the treatment is administered.

(3) The advocate shall explain to the incapable erson,

(a) that the attending physician is of the opinion that the person is incapable;

(b) that another person has claimed authority to give or refuse consent to treatment on the incapable person's behalf;

(c) the decision made by that person;

(d) the person's right to refuse to accept the decision.

COMMENTARY

Visit by an Advocate:

When a substitute decision is being made for a person who the attending physician believes is mentally incapable, the patient must be visited by an advocate. The advocates visit takes place whether the decision by the substitute is to consent to or to refuse treatment. The advocate explains the situation to the patient. The patient then has the right to refuse the decision. The right to refuse the decision exists whether or not there is mental capacity. The provision does not assume that consent to treatment by the substitute is of greater concern than refusal of treatment. Of course, there is no point to the visit of the advocate to an unconscious patient.

A patient has the right to refuse a decision by a substitute other than a guardian or an attorney for personal care whose authority has been validated by the Public Guardian and Trustee. These substitutes are given priority over the patient's right to refuse. The guardian has been appointed by the court after determination of the patient's mental incapacity. The attorney for personal care is the patient's choice as a substitute decision maker who has received validation only after an assessment of the individual's mental capacity has established lack of capacity to make his or her own medical decisions.

EXISTING LAW

medical treatment to a patient, the treatment or course of treatment shall not be provided pending the outcome of the appeal, unless otherwise ordered by a judge of the court appealed to.

(12) Sections 33a, 33b, 33c, 33d, 33e and 33f apply with necessary modifications to an application under subsection (1).

35b.—(1) A patient determined or presumed to be not mentally competent for the purpose of section 35 may apply in the prescribed form to the review board to inquire into whether the patient is not mentally competent.

(2) If an application is made under subsection (1), the proposed psychiatric treatment shall not be given until the matter is determined by the review board or, where the patient appeals its decision, until the matter is finally determined, unless otherwise ordered by a judge of the court appealed to.

(4) Subsections (1), (2) and (3) do not apply if he reason for the opinion that the person is ncapable is that he or she is unconscious, and in hat case, the fact that the person is unconscious hall be noted in the person's medical record.

52.-(1) If a person who is, in the attending hysician's opinion, incapable refuses to accept he decision of a person described in paragraph 2, , 4, 5, 6, 7 or 8 of subsection 50(1), the ecision becomes ineffective.

(2) In that case, the attending physician shall btain a written opinion from an independent sychiatrist or, if none is available, from an ndependent physician.

(3) If the independent psychiatrist or physician grees that the person is incapable, the attending hysician shall immediately inform the Public uardian and Trustee that the person is incapable nd refuses to accept the decision made on his or er behalf.

(4) The Public Guardian and Trustee may make an pplication under section 54 (appointment of uardian) or 64 (temporary guardian in urgent ase).

Patient's Objection:

The importance given to a patient's right to refuse, combined with the required visit from the advocate makes an informal medical substitute decision making process both practical and proper. Refusal of a substitute decision made by family, friends or the Public Guardian and Trustee triggers an independent assessment of the patient's mental capacity to decide for him or herself. Of course, if the independent assessment by the psychiatrist or physician determines that the person is capable of consenting or refusing consent to treatment there is no further issue of substitute consent. If the independent assessment indicates that the person is incapable the Public Guardian and Trustee must be informed for the purpose of bringing an application for guardianship or where there is need for prompt action to prevent serious adverse effects for the purpose of bringing an application for temporary guardianship.

These provisions should prevent persons who are mentally incapable from being denied needed medical treatment. They should also protect the rights of those who are capable to make decisions for themselves.

COMMITTEE'S PROPOSED LEGISLATION

53.-(1) If, in the attending physician's opinion, a person is incapable and the delay necessary to obtain consent to treatment on the person's behalf would endanger his or her life, a limb or a vital organ, the attending physician may administer the treatment without consent.

(2) The attending physician shall promptly note in the person's medical record that he or she is of the opinion that the person is incapable and that the delay necessary to obtain consent would endanger the person's life, a limb or a vital organ.

(3) If the person refuses treatment that the attending physician proposes to administer in accordance with subsection (1), the attending physician shall not administer the treatment without having made all efforts that are reasonable in the circumstances to obtain a written opinion from an independent psychiatrist or, if none is available, from an independent physician.

(4) If a second opinion is obtained, the attending physician shall not administer the treatment unless the independent psychiatrist or physician agrees that the person is incapable.

(5) If no second opinion is obtained, the attending physician shall promptly note in the person's medical record what efforts were made to obtain one and why they were unsuccessful.

COMMENTARY

Emergency Treatment:

The Committee has made no significant changes to the principles of emergency treatment as it now exists in law and practice. Central to the principle is that the intentions of a competent patient must be respected. The mentally capable individual who refuses a blood transfusion must have his or her decision respected.

The first subsection sets the conditions for the operations of the emergency treatment provision. The attending physician must form the opinion that the person is without capacity to consent. For example, this may be because the patient is unconscious following an accident. The physician also must be of the opinion that the delay necessary to obtain the individual's own consent or the consent of those substitutes provided for in the legislation would put the patient's life, limb or vital organ in serious jeopardy. If these conditions are met the physician may administer treatment without consent.

The refusal by the patient of the treatment proposed by the physician cannot be ignored. The physician is given the duty of making all reasonable efforts to obtain a written opinion as to the the person's ability to consent. The opinion must come from an independent psychiatrist or, if none is available from an independent physician. However, where a physician is faced with the choice of respecting the refusal of a person who he or she has reasonable grounds to believe (see section 3(2) and commentary) to be mentally incapable, and giving treatment to prevent loss of life, limb or vital organ, the law must favour the preservation of life and essential health.

If the independent opinion is that the person is capable of giving and refusing consent, there can be no treatment without that consent.

To assure compliance with the requirement of a second opinion where possible and to provide evidence of compliance the attending physician is required to state the the efforts made to obtain a second opinion and why the efforts were unsuccessful. Obviously it will be much easier to obtain independent opinions in communities with large hospitals that it will be in smaller communities that may have only one physician. The legislation must be workable everywhere in Ontario.

EXISTING LAW

The Mental Health Act, as amended

35.—(2) Psychiatric and other related medical treatment shall not be given to a patient,

(b) where the patient is not mentally competent,

(iii) unless a physician certifies in writing that there is imminent and serious danger to the life, a limb or a vital organ of the patient requiring immediate treatment and the physician believes that delay in obtaining consent would endanger the life, a limb or a vital organ of the patient.

(3) Subclause (2) (b) (iii) only authorizes the giving of such treatment as is necessary to preserve the life, a limb or a vital organ of the patient.

The Public Hospitals Act (Regulations)

50. No surgical operation shall be performed on a patient or an out-patient unless a consent in writing for the performance of the operation has been signed by,

but where the surgeon believes that delay caused by obtaining the consent would endanger the life or a limb or vital organ of the patient or out-patient, as the case may be,

(*d*) the consent is not necessary; and

(*e*) the surgeon shall write and sign a statement that a delay would endanger the life or a limb or vital organ, as the case may be, of the patient or out-patient. O. Reg. 100/74, s. 11, *part*.

COMMITTEE'S PROPOSED LEGISLATION

COURT APPOINTMENT OF GUARDIANS

54.-(1) The court may, on any person's
plication, appoint a guardian for a person who is
capable of personal care and, as a result, needs
cisions to be made on his or her behalf by a
rson who is authorized to do so.

COMMENTARY

Existing Law:

Guardianship of the person gets very little attention in the existing Mental Incompetency Act. A mentally incompetent person is defined in the Act (at right). This fact must be proven beyond reasonable doubt [section 7(1)]. In the ordinary case this may be proven by affidavit evidence but a trial of the issue of mental incompetence may be held at the direction of the judge. Even where there is no trial, counsel are required to appear before the judge. Where mental incompetency has been proven the court may appoint a committee of the person (guardian). The Act does not outline the powers or duties of a committee of the person.

Court Application:

Like the Mental Incompetency Act, the standard of proof is proof beyond reasonable doubt. No restrictions are placed on the persons that may apply to the court to have a guardian appointed. In this connection the existing act provides that a list of persons may apply but concludes with "any person".

Fundamental justice demands that an individual who may have his or her right to make personal care decisions removed should have a right to be heard. There are many cases where a stroke, a degenerative disease, or an accident has rendered an individual completely incapable of personal care and the problem for the family or care providers is to have a responsible person making personal care decisions. In these cases, the Committee is of the view that an application should be available that can result in the appointment of a guardian without needless expenditure. Of course, this process must protect the civil and human rights of the person alleged to be incapable of personal care.

The Committee is also of the view that guardianship should not be resorted to unless the person alleged to be mentally incapable is in need of a guardian. That is, given the individual's incapacity and given the types of decisions he or she is being confronted with, whether there should be a person authorized to make decisions on his or her behalf. The appointment of a

EXISTING LAW

The Mental Incompetency Act,

as amended

1. In this Act,

(*e*) "mentally incompetent person" means a person,

(i) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or

(ii) who is suffering from such a disorder of the mind,

7.—(1) The court upon application supported by evidence may by order declare a person a mentally incompetent person if the court is satisfied that the evidence establishes beyond reasonable doubt that he is a mentally incompetent person. R.S.O. 1970, c. 271, s. 7 (1).

4.—(1) Subject to the *Mental Health Act*, the court has all the powers, jurisdiction and authority of Her Majesty over and in relation to the persons and estates of mentally incompetent persons, including the care and the commitment of the custody of mentally incompetent persons and of their persons and estates.

(2) The court may make orders for the custody of mentally incompetent persons and the management of their estates, and every such order takes effect, as to the custody of the person, immediately and, as to the custody of the estate, upon the completion of the committee's security. R.S.O. 1970, c. 271, s. 4.

(2) The standard of proof that a person is incapable of personal care and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so, is proof beyond a reasonable doubt.

55.-(1) Notice of an application to appoint a guardian shall be served, together with the documents described in subsections 56(1), (2) and (3),

(a) on the person alleged to be incapable of personal care;

(b) on the Public Guardian and Trustee;

(c) on the proposed guardian;

(d) on the following persons, if known:

1. The conservator of the person alleged to be incapable.
2. The person's attorney for personal care.
3. The attorney under the person's continuing power of attorney for property.
4. The preferred guardian designated by the person under section 43.

(2) The notice and accompanying documents need

guardian must be necessary for the person's well-being; it should not be sufficient to simply show the appointment will be of some benefit to the person. The effect of conferring authority on a guardian is the placing of power in one person's hands to legally make decisions for another. This should not be done lightly, and only where there is a demonstrated need.

Standards of Proof:

The standard of proof for the appointment of a guardian is proof beyond reasonable doubt. Since the appointment of a guardian confers the power to make decisions for another that affect that person's life in the most intimate of ways it is important that the court be without doubt about all issues relating to the need for a guardian.

Notice of Application:

The Notice of Application and accompanying documentation must be served on the person who is allegedly mentally incapable; the Public Guardian and Trustee; and the proposed guardian. A conservator, the preferred guardian, an attorney under a continuing power for property and an attorney for personal care must also be served, if any is known to the applicant. Service must be in accordance with the Rules of Practice.

COMMITTEE'S PROPOSED LEGISLATION

not be served on the applicant.

(3) The notice and accompanying documents shall lso be served on at least two of the following ersons, by ordinary mail sent to their last known ddress, in accordance with subsection (4):

1. The spouse of the person alleged to be incapable, and the person's children who are at least sixteen years old.
2. The person's parents.
3. The person's brothers and sisters who are at least sixteen years old.
4. The person's friends who are at least sixteen years old and have been in personal contact with him or her during the preceding twelve months.

(4) All the persons described in paragraph 1 of bsection (3) who are known shall be served, and fewer than two persons described in that ragraph are served, all the persons described in e next paragraph who are known shall be served, d so on until at least two persons have been rved.

(5) The parties to the application are the plicant and the persons served under clauses)(a), (b), (c) and (d).

(6) A person described in clause (1)(d) who has been served, or a person described in section (3), whether served or not, is entitled be added as a party at any stage in the ceeding if he or she serves a notice of

COMMENTARY

At least two persons who are most closely related to the person, and who, therefore, have an interest in the application must be served by ordinary mail. Those listed in the first paragraph must all be served. If two are not found or reasonably available, those in the next paragraph must be served. Service continues in each succeeding paragraph until at least two persons have been served after attempts are made to serve the entire paragraph. The reason for service of the entire paragraph is to avoid applicants choosing to serve specific persons in a class, such as siblings sympathetic to the application, and neglecting others who have an equal right to receive notice of the application.

The purpose of the notice is to give these persons the opportunity to oppose the application, provide evidence, or to demand a full hearing. This opportunity, for example, would allow these persons to ask the court to appoint a guardian who would be more appropriate than the person proposed in the application.

Parties to the application are those in subsection (1). Those listed for service in subsection (3), whether or not served, and those in clause (1)(d) who have not been served, have the right to be added as parties. To be added, a person must file a notice of appearance along with proof of service of the notice on those served under subsection (1). This circumscribed list of parties would reduce potential costs associated with the application.

EXISTING LAW

appearance on every person who was served under subsection (1) and files it with proof of service.

(7) For the purposes of subsection 56(7), the applicant shall ensure that an advocate receives a copy of the notice of application and of the accompanying documents when they are served on the parties.

56.-(1) An application to appoint a guardian shall be accompanied by,

(a) the proposed guardian's consent;

(b) a guardianship plan, in the prescribed form; and

(c) if the proposed guardian is not the Public Guardian and Trustee, one of the following:

1. The Public Guardian and Trustee's certificate that he or she has examined and approved the guardianship plan, has assessed the proposed guardian and does not object to the appointment.
2. The Public Guardian and Trustee's reasons for not giving the certificate.

The notice of application and accompanying documentation is also transmitted to an advocate by the applicant. The advocate requires the documentation for purposes of his or her visit to the person to explain the significance of the application and the right to oppose it.

The Committee seriously considered but ultimately rejected the idea of having the advocate serve the person who is alleged to be incapable with the notice of application and other documentation. The advantage of this approach would have been to avoid the person receiving official-looking and, therefore, frightening documentation without someone to explain it. This advantage is outweighed, in the Committee's view, by the likelihood that, if the advocate delivered the documentation, the person would likely associate the advocate with the process that might remove his or her rights. Since the advocate is a major safeguard of the rights of the individual and the means whereby legal representation can be arranged for him or her, there should not be a connection between the applicant and the advocate.

Evidence on Application:

A variety of documentation must accompany an application for guardianship. First, the consent of the proposed guardian must be given. This is of great importance when the proposed guardian is not the applicant. Second, a plan of guardianship must be developed. The appropriateness of the plan of guardianship and the proposed guardian would be reviewed by the Public Guardian and Trustee. The Public Guardian and Trustee's certificate approving of both must accompany the application or where approval is not given, a written statement setting out reasons for the Public Guardian and Trustee's reservations.

COMMITTEE'S PROPOSED LEGISLATION

(2) The application may also be accompanied by ne or more statements, each made in the prescribed orm by a person who knows the person alleged to be ncapable and has been in personal contact with him r her during the twelve months preceding the otice of application.

(3) If the applicant wishes the application to e dealt with under section 57 (summary isposition), the application shall also be ccompanied by two statements made in the rescribed form, one by a physician and the other y a psychiatrist, a second physician, a sychologist or a social worker.

(4) Each statement shall indicate that its maker s of the opinion that the person is incapable in espect of the functions described in section 41 personal care), or in respect of some of them, and hall set out the facts on which the opinion is ased.

COMMENTARY

Statements of Witnesses:

The documentary evidence of the incapacity of the person who is the subject of the application can be of two types. It may include the statements in the prescribed form setting out the facts and opinions of those who have been in personal contact with him or her over the preceding twelve month period. These would often be the statements of close family and friends. If the application is to be dealt with summarily there must be statements of professionals who have assessed the person within the six months preceding the application.

Professional Assessment:

The Committee considered, but rejected, the view that the evidence of persons who were not professionals but who were well acquainted with the individual should be sufficient to establish mental incapacity for personal care for the summary disposition provisions. It should be noted that the evidence of non-professionals would be sufficient to establish mental incapacity to manage property (see section 21). In the Committee's view it is easier for non-professionals to determine incapacity to manage property. Often there will be those who have seen the individual manage property e.g. a spouse, a business colleague who will have significant evidence about the loss of capacity to understand financial matters. Another consideration of the Committee is the great importance our society has traditionally placed on the right of an individual to make his or her own personal decisions. For these reasons the Committee would require professional assessments to be part of an application that is for summary disposition.

One of the assessments must be that of a physician. The physician's examination and assessment may disclose that the condition of the alleged incapable person is physical and may be remedied. Certain physical imbalances can lead to temporary mental incapacity. The other mandatory assessment must be done by a professional who attests that he or she is qualified to do an assessment of mental capacity. Each of the professions chosen is subject to the discipline of a professional organization for performing acts beyond those for which he or she is competent.

EXISTING LAW

(5) The statement may also indicate that its aker is of the opinion that the person needs ecisions to be made on his or her behalf by a erson who is authorized to do so and, in that ase, shall set out the facts on which the opinion s based.

(6) Each statement referred to in subsection (3) hall,

(a) indicate that its maker performed an assessment of the person's capacity during the six months preceding the notice of application;

(b) contain an evaluation of the nature and extent of the person's incapacity, setting out the facts on which the evaluation is based;

(c) in the case of a statement by a psychiatrist, second physician, psychologist or social worker, indicate that its maker is qualified to perform assessments of capacity.

(7) An advocate shall visit the person alleged o be incapable of personal care and explain to him r her the significance of the notice of pplication and accompanying documents and the ght to oppose the application.

(8) The applicant shall file the advocate's atement, in the prescribed form, indicating that e advocate has complied with subsection (7), or at he or she was prevented from visiting the

The professional assessments will often be done by the professionals acting as a team. The minimum professional involvement will ensure that a medical and mental assessment has been done and is before the court.

Subsection 57(1) will assure that at least one of the statements made addresses the issue of the whether the alleged incapable person is in need of a guardian as a result of the mental incapacity for personal care. Often this evidence will be supplied to the court by those who know the person alleged to be incapable.

At present there is great diversity in the types of evidence now provided to the courts in connection with applications under the Mental Incompetency Act. To avoid this and to ensure that the court has a high standard of evidence before it, standard documentation must be developed and prescribed by the regulations under the Act. The professions should be involved in the process so that the documentation reflects the standards of the professions as well as meeting the evidentiary standard imposed by the Act.

Statement of an Advocate:

A person alleged to be incapable may be frightened by court proceedings and unable to understand the documentation without actually being mentally incapable of personal care. An application can be heard without requiring an appearance by parties at the hearing. To be an effective method of ascertaining mental capacity, the Committee feels that effort must be directed to making the proceedings comprehensible to the person who is allegedly incapable. The advocate would meet this concern. The advocate would visit the person and explain the nature of the process to ensure that the person has the best possible understanding of what is happening. Where the person wants to object to the process, the role of the advocate would be to put the person in contact with those person despite attempts to do so.

(9) If the advocate was prevented from visiting the person, the statement shall contain a detailed explanation.

57.-(1) The registrar of the court shall submit the notice of application and accompanying documents to a judge of the court if the following conditions are satisfied:

1. No person has delivered a notice of appearance.
2. The statements referred to in subsection 56(3) (professional assessment) accompany the application.
3. At least one of the statements referred to in subsection 56(2) or (3) indicates that its maker is of the opinion that the person needs decisions to be made on his or her behalf by a person who is authorized to do so.

(2) On hearing the application, the judge may,

(a) grant the relief sought;

(b) adjourn the application and require the parties or their counsel to adduce additional evidence or make representations; or

(c) order that the application, or any issue, proceed to trial, and give such directions as are just.

who can provide legal assistance. This personal contact by someone experienced and trained to deal with those of diminished capacity is considered by the Committee to be an essential component of the application process.

The applicant is to file a statement of the advocate in which the advocate certifies that the visit and explanation has taken place. Where the advocate was unable to gain access to the alleged incapable person, e.g. where someone barred access, the advocate must state what efforts were made to visit and explain the documentation and why he or she was unsuccessful.

Disposition:

Where an application is brought and is accompanied by the required documentation, including professional assessments, and where no notice indicating a party's intention to dispute (appearance) is filed and the court is satisfied with the evidence, the court may appoint a guardian. Parties and counsel need not appear at the hearing. However, where the court is not satisfied by some aspect of the documentary evidence, the court is empowered to require counsel or the parties to appear and make representations or present additional evidence. The court can also order the application or any issue to proceed to trial.

The revised hearing procedure would save both time and legal expenses. In many cases, a stroke, a degenerative disease or an accident has rendered an individual completely incapable of personal care. Family or care providers need to have a responsible person making personal care decisions. The procedure would be expedient and would not require legal representation because standard documentation would be used throughout.

The Rules of Practice apply to applications and the provisions would govern applications that cannot be disposed of summarily because the documentation required cannot be obtained or because the application is opposed. The court has authority to order an assessment to be carried out by qualified professionals if one did not accompany the application or if evidence did not establish incapacity beyond reasonable doubt. (See section 73.) Legal representation would be necessary for the person alleged to be incapable and other parties if the application was heard under these circumstances.

58.-(1) A person who provides residential, social, health care, training or support services to an incapable person for compensation shall not be appointed his or her guardian.

(2) Subsection (1) does not apply to members of the incapable person's family or to the following persons:

1. The conservator.
2. The attorney for personal care.
3. The attorney under a continuing power of attorney for property.
4. The preferred guardian designated under section 43.

(3) Except in the case of an application that is being dealt with under section 57 (summary disposition), the court shall consider,

(a) whether the proposed guardian is the attorney under a continuing power of attorney for property or has been designated as preferred guardian under section 43;

(b) the incapable person's wishes, if known; and

(c) the closeness of the applicant's personal relationship to the incapable person.

Relatives Preferred:

As noted earlier, the intention is that substitute decisions should be as authentic as possible, that is they should reflect the intentions of the person when capable and the wishes of the individual should be respected whenever possible. This section sets out factors that should be considered by the court on applications that proceed by way of a regular hearing or a trial.

Subsection 1 sets out the central principle that the providers of services for remuneration should be precluded from serving as substitute deciders for those they serve. There is in this situation a conflict of interest that should be avoided unless there is a more important value in issue.

Subsection 2 establishes that there are certain persons who may be appointed as guardian despite a conflict of interest. The Committee believes that in some cases it may be more important to appoint a person who is close to the individual who is mentally incapable than to avoid conflicts of interest. The group of persons to whom this exception may apply are family, a conservator managing the person's propery, and a person chosen by the incapable person to manage property or to make personal decisions for him or her. The principle of obtaining a guardian who will make authentic decisions for a person who is incapable outweighs the conflict of interest issues in certain cases.

The assumption underlining the words "except in an application that is being dealt with under section 57 (summary disposition)" is that when an application is dealt with by summary disposition all possible objections have been dealt with by those bringing the application. Since the interests are in agreement there is no need to bring further evidence before the court. Where this is not the case this subsection directs the court to examine who would be the most appropriate person to serve as guardian. The considerations are directed first to find whether the person who is mentally incapable chose the individual he or she wanted to make substitute decisions. Then, the present wishes of the person are considered. Finally, the closeness of the person's relationship to a proposed guardian are considered.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(4) The court may, with their consent, appoint two or more persons as joint guardians or may appoint each of them as guardian in respect of a specified period.	Subsection 4 contemplates situations where a person who is incapable will live in several places during a year, for example, six months with a sister and six with a brother. Each may need guardianship authority to deal with situations that may arise during the time the individual is living with him or her. This provision allows the court to make an order to fit these types of circumstances. Each can be appointed for the specified period during which the individual lives with him or her. The provision also allows for joint guardianship. It should be noted that a drawback of joint guardianship is that two or more people must agree on an action.	
59.-(1) An order appointing a guardian for a person shall include a finding that the person is incapable in respect of the functions described in section 41, or in respect of some of them, and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.	Finding of Incapacity: It is imperative that everyone constantly bear in mind that guardianship is a major intrusion into the life of the individual for whom a guardian is appointed. As discussed below guardianship may be full or partial. It is important that the order set out the incapacities found to exist. The functions that are relevant to a guardianship order are; health care, nutrition, shelter, clothing, hygiene or safety. The powers of partial guardian may only be exercised in relation to the functions of which the individual is mentally incapable. People dealing with the guardian ought to be able to satisfy themselves that the guardian has the power he or she purports to exercise.	
(2) An order appointing a guardian may, (a) make the appointment for a limited term as the court considers appropriate; (b) impose such conditions on the appointment as the court considers appropriate.	The court has authority to limit the time during which the guardianship will operate. This type of limitation would be appropriate where the medical evidence indicates that the condition rendering the individual incapable is of temporary duration and that recovery of capacity can be expected within a certain period. The court can impose such other conditions as it considers appropriate. For example, the person for whom the guardian is being appointed may have a strong aversion or liking for residing in a place. The order might be made conditional on the place of residence.	

(3) The order shall specify whether the guardianship is full or partial.

60.-(1) The court may make an order for full guardianship if the court finds that the person is incapable in respect of all the functions described in section 41.

(2) Under an order for full guardianship, the guardian may,

(a) exercise custodial power over the person under guardianship and determine his or her living arrangements;

Full or Partial Guardianship:

There is provision for two forms of guardianship: full guardianship and partial guardianship. The Committee considered, and rejected, the idea that all guardianship should be limited. It is the Committee's view that many of the applications brought to court will be the result of a person being totally incapable of personal care. Those persons will need to have the ordinary life decisions made for them and a set of powers to deal with these situations should be conferred on the guardian without the need to prove that a particular power was needed at the time of the application. To require such proof would result in unnecessary expenditure of time and money. There would be no practical benefit for the person who is incapable.

Full Guardianship:

Before an order for full guardianship could be made, the court must be satisfied beyond reasonable doubt that the person is totally incapable of personal care. To be incapable of personal care in all respects, the individual would lack decision-making capacity with respect to health care, nutrition, shelter, clothing, personal hygiene and personal safety. It would also be necessary to show that, as a result of these incapacities, the individual suffers, or who is likely to suffer, serious illness, injury or deprivation of liberty or personal security ("serious adverse effects").

Powers of a Full Guardian:

Subsection 2 provides the powers of a full guardian. The limitations of the powers set out in this subsection are set out in subsection 4. The specific powers set out in this subsection should be sufficient to permit a guardian to deal with the life decisions necessary for a person who is incapable in respect of all the functions for which a guardian is appointed. The guardian has the right to decide on living arrangements.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(b) be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers;	The guardian is the litigation guardian, that is the person who lawfully represents the person who is incapable and instructs counsel on his or her behalf in all legal proceedings related to the person. The guardian may also settle claims and commence proceedings on behalf of the person who is incapable. The guardian also has power to access and deal with personal information in place of the person who is incapable.	
(c) settle claims and commence and settle proceedings on the person's behalf, except claims and proceedings that relate to the person's property or to the guardian's status or powers;		
(d) have access to personal information to which the person could have access if capable, and consent to the release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status or powers;		
(e) give or refuse consent on the person's behalf to, (i) medical or psychiatric treatment, (ii) psychological treatment, (iii) other health services and social services;	Clause (e) establishes major powers of the guardian, powers to give or refuse consent on the person's behalf to services that may be essential but that are also quite intrusive. "Other health services" would permit the guardian to request and authorize the provision of such professional health services as dentistry.	
(f) make decisions about the person's employment, education, training and recreation;	Clause (f) will permit the guardian to make other decisions that may be important for an individual. This clause is inserted more for the benefit of those that are providing such services than for either the guardian or the person under guardianship. In practice these decisions must reflect the desires of the person under guardianship since there is no way to enforce compliance.	
(g) exercise the other powers and perform the other duties that are specified in the order.	Clause (g) is a basket clause to permit a court to confer powers on the guardian that may be needed in special cases. The need for these powers must be established for the court to confer them.	

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(3) If the guardian has custodial power over the person and the court is satisfied that it may be necessary to apprehend him or her, the court may in its order authorize the guardian to do so. (4) In that case the guardian may, with the assistance of a police officer, enter the premises specified in the order (between 9 a.m. and 4 p.m. or during the hours specified in the order) and search for and remove the person, using such force as may be necessary.	Subsection 3 allows the court to authorize the guardian to apprehend the person under guardianship, using force if necessary. Where force is necessary the assistance of a police officer would be employed. The provision is designed to meet situations where a person who is incapable is being detained, neglected or abused by those who have custody of the individual, in fact, though not in law. It should be noted that section 2 imposes a duty on the court and on the guardian to choose the least restrictive and intrusive course of action that is available and is appropriate in the circumstances. The court would authorize apprehension only if it is satisfied on the evidence before it that such an extreme measure is in fact necessary. There are other restrictions on the power. The premises that can be entered using force must be specified in the order. Unless specifically addressed in the order entry on premises for the purpose of forcible removal could take place only between 9 a.m. and 4 p.m..	
(5) Unless the order expressly provides otherwise, the guardian does not have power,	Subsection 5 provides the ordinary limitations on the powers conferred under subsection 2. These limitations may be expressly removed by the court when the applicant proves to the court that there is need to remove the limitation.	
(a) to consent on the person's behalf to his or her admission to a psychiatric facility as defined in the Mental Health Act;	Clause (a) limits the ordinary custodial authority of a full guardian. He or she cannot consent to the admission of a person under guardianship to a psychiatric facility. This limitation would prevent the guardian from consenting to the residence of the person under guardianship as a voluntary patient. Since the rules governing involuntary commital to a psychiatric facility apply regardless of consent, a person under guardianship could be confined in such a facility if he or she meets the strict criteria for committal. The court can authorize the guardian to consent to a voluntary residence in a psychiatric facility. Some persons in the advanced stages of Alzheimer's disease cannot be cared for in most residential care facilities. The geriatric ward of a psychiatric facility may be the only appropriate choice of residence.	

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(b) to restrain or confine the person, or to give consent on his or her behalf to restraint or confinement;	For obvious reasons the ordinary custodial authority does not confer the right to confine or restrain or to authorize these intrusive measures. Nevertheless there are situations that may require some measure of confinement. Persons with certain neurological diseases may take to wandering without knowledge of where they are or where they are going. When a person under guardianship is in such a condition some measure of confinement or restraint may be necessary. It should be noted, however, that if the guardian has been given authority by the court to restrain or confine, this authority may only be exercised in circumstances where such measures are necessary to prevent bodily harm to the person or to others (see subsection 61(3)). In an emergency situation, judicial authorization to restrain or confine is not necessary. Subsection 61(1) preserves the common law duty on caregivers to restrain persons to prevent serious bodily harm.	
(c) to change existing arrangements in respect of custody of or access to a child, or to give consent on the person's behalf to the adoption of a child;	The limitation in clause (c) prevents a full guardian from consenting to changes in existing arrangements with respect to the custody of or access to a child, or giving consent on the person's behalf to the adoption of a child. There will be cases where the court will confer such powers on a guardian. It will want to be sure that the guardian is someone with the fullest understanding of the prognosis for the recovery of capacity of the person under guardianship and all the complex issues that should be addressed in making a decision of such a grave nature. It is to ensure that there is the fullest consideration of the issues that this limitation is imposed.	
(d) to give consent on the person's behalf to, (i) restraint, confinement or the application of electric shock for the purpose of aversive conditioning,	Clause (d) concerns itself with another serious issue that will arise in the care of a few individuals. There are some mentally incapable individuals who are so physically self-destructive that they will cause themselves serious physical harm or death if not restrained. Aversive conditioning in the form of confinement in a non-stimulating environment as a means of altering the behaviour has been used with some success under strictly controlled conditions. Similarly the application of electric shock, as aversive conditioning,	

(ii) any non-therapeutic medical, psychiatric, psychological or other health treatment or procedure.

(6) The guardian does not have power to give consent on the person's behalf to his or her involvement in a research project or experiment, unless the order confers that power and specifically identifies the project or experiment.

has been used in some cases with success. To ensure that these severely intrusive procedures are only consented to when there is no less intrusive alternative and under the most controlled conditions, a guardian to have authority to consent must have this authority specifically conferred by the court.

Subclause (ii) prevents a guardian from having power to consent to any non-therapeutic treatment or procedure unless the court gives the authority specifically in the order. A therapeutic treatment or procedure is one whose intended result is to be of benefit to the individual receiving it. It is difficult to conceive of situations where the court would confer the power to consent to a non-therapeutic treatment or procedure but it is possible that the need for the power can be established. It should be noted that subsection (9) specifically denies the court the ability to confer on a guardian the power to consent to a non-therapeutic sterilization and to psychosurgery as defined under the Mental Health Act.

Grave concerns have arisen with respect to the possible involvement of persons who are mentally incapable in scientific research or experimentation. By involvement, the Committee means any physical examination, giving of medication (or withholding of therapeutic medication) or performance of a procedure, carried out for the purpose of research or experimentation. By scientific research or experimentation, the Committee means that which involves an individual, but is not intended for the therapeutic benefit of that individual. Note that as a result of subsection (8), the power to consent to a research project or experiment which does not involve the person, that is, one which consists only of the compilation or analysis of information, is not excluded from the authority of a guardian.

A guardian with authority to give or refuse consent to therapeutic treatment does not have authority, thereby, to consent to the involvement of the person under guardianship in any scientific research or experimentation. However, the Committee believes that some scientific research or experimentation may be of such benefit to an individual or to classes of person who are

COMMITTEE'S PROPOSED LEGISLATION

COMMENTARY

EXISTING LAW

(7) The court shall not make an order conferring he power referred to in subsection (6) unless the ourt is satisfied that the following conditions re met:

1. The project or experiment is conducted under the auspices of a university or hospital whose research ethics committee has approved it.
2. The benefits to the person that will result from involvement in the project or experiment outweigh any risks.
3. The project or experiment will not demean the person's dignity.

(8) Subsection (6) does not apply to research projects or experiments that consist only of the compilation or analysis of information.

mentally incapable and, at the same time, of such low risk to those involved, that an absolute bar should not be imposed. Where the conditions in subsection (7) have been met, the court may specifically authorize a guardian to consent to the participation of the person for whom he or she is responsible in a specific research project or a specific experiment. A hearing of the matter would ensure that the right to life, liberty and security of the person under guardianship is enforced (s.7 of the Canadian Charter of Rights and Freedoms) and that any deprival of that right is made in accordance with the principles of fundamental justice. The judicial process would also ensure that the person under guardianship would have a right to equal protection and benefit of the law without discrimination on the basis of mental disability (s.15 of the Charter).

The Committee is concerned that no special laws exist to regulate research and experimentation in universities, hospitals, by professionals working on their own, or in the private sector. To protect the integrity of persons who are mentally incapable, courts are only able to approve scientific research or experimentation conducted by personnel in universities and hospitals having research ethics committees. These committees examine research proposals and grant approval only when they meet the established ethics guidelines. Approval must be granted in order for the court to make an order. This safeguard provides some assurance that persons who are mentally incapable will not be exploited. Courts do not have authority to approve research by individuals or by entities in the private sector or by the government.

Other safeguards are included to protect the integrity of the person involved. The benefits resulting from the experiment must outweigh any risks, and the project or experiment must not be detrimental to the person's dignity. The absence of direct benefit to the person will not be an automatic barrier to the participation of the person in a particular project if there are also no corresponding risks.

(9) No power to give consent on an incapable person's behalf to non-therapeutic sterilization or psychosurgery as defined in section 35 of the Mental Health Act is conferred on a guardian by this Act or by an order made under this Act.

61.-(1) Clause 60(5)(b) does not affect the common law duty of care givers to restrain or confine persons, in emergencies, as may be necessary to prevent serious bodily harm to them or to others.

(2) Each time a caregiver restrains or confines a person whom the caregiver believes to be incapable, he or she shall notify the following persons:

1. The Public Guardian and Trustee, unless the person has a guardian with the power referred to in clause 60(5)(b).
2. The person's guardian, if any.
3. The attorney for personal care, if any, under a power that has been validated under section 45 or 46.

The Committee believes that there are certain powers over another that it is unwise to give to another because it cannot be proven that their exercise is for the benefit of a person who is mentally incapable. These are set out in subsection (9).

Substitute consent for psychosurgery as defined and prohibited by the Mental Health Act is prohibited.

In E. (Mrs.) v. Eve [1986] 2 S.C.R. 388, the Supreme Court of Canada decided that non-therapeutic sterilization cannot be justified on the basis of being to the benefit of the person. The Act, therefore, prohibits substitute consent for non-therapeutic sterilization.

Restraint or Confinement:

The common law duty of care givers to restrain or confine persons in an emergency as may be necessary to prevent serious bodily harm to them or to others is preserved by this provision. This common law duty is of vital importance to hospitals in the care of persons who are physically ill and persons who are psychiatrically disabled and are mentally incapable of personal care. The preservation of the duty is intended to provide assurance that they can continue to provide care.

It must be emphasized that this emergency power must be used with extreme caution. Notification to the Public Guardian and Trustee should ensure that where emergency restraints or confinements are used frequently on one person, appropriate measures will be taken to secure judicial authorization for restraint or confinement which is predictable, habitual or serial.

Regulations made under the Nursing Homes Act seem to permit the use of a restaint on a resident over an indefinite period of time subject to periodic reassessments of the need for the restraint. Their validity is questionable; and they greatly exceed what the Committee contemplates as a proper application of restraints by care-givers in an emergency.

The Mental Health Act, as amended

35.(c) "psychosurgery" means any procedure that, by direct or indirect access to the brain, removes, destroys or interrupts the continuity of histologically normal brain tissue, or which inserts indwelling electrodes for pulsed electrical stimulation for the purpose of altering behaviour or treating psychiatric illness, but does not include neurological procedures used to diagnose or treat organic brain conditions or to diagnose or treat intractable physical pain or epilepsy where these conditions are clearly demonstrable.

The Nursing Homes Act,
(Regulations)

55.—(1) An apparatus for restraining a resident shall be applied to a resident only,

(a) when necessary to protect the resident from injury to himself or others, and

(b) on the written order of a physician who has attended the resident and approved the apparatus as appropriate for its intended use in restraining the resident.

(2) Where it is not possible in a situation set out in clause (1) (a) to obtain an order of a physician referred to in clause (1) (b), an apparatus for restraining a resident may be applied on the order of the registered nurse in charge provided that a physician's order is obtained within twelve hours of the application of the restraint.

(3) Subject to subsection (4), no order for a restraint under subsection (1) or (2) shall be enforced for a period exceeding twelve hours.

(4) Where a situation appears to warrant the use of a restraint on a resident for a period exceeding twelve hours, a reassessment of the need for the restraint shall be carried out by the registered nursing staff of the nursing home and where the reassessment indicates that the continued use of the restraint is warranted, the

(3) A guardian who has the power referred to in clause 60(5)(b) shall exercise it only as may be necessary to prevent bodily harm to the person or to others.

62.-(1) The court may make an order for partial guardianship if it finds that the person is incapable in respect of some but not all of the functions described in section 41.

Where there may be need for the long-term application of restraints, whether physical or chemical, the resident of the nursing home should have a guardian. Specific judicial authorization should be necessary before a guardian has the power to consent on the resident's behalf to the use of any restraints.

As noted earlier, no restraint or confinement can be authorized except where it is necessary to prevent bodily harm to the person or to others.

Partial Guardianship:

Partial guardianship is intended to deal with those situations where an incapacity relates to one or more of the functions set out in the definition of 'incapacity for personal care'. The power conferred by the court on the partial guardian would be a limited number of those that would be conferred on the full guardian. Partial guardianship is recognition of the fact that mental capacity can exist with respect to certain functions, while not existing, with respect to other functions. For example, a person may be able to make all decisions except those relating to nutrition and, as a result, be in jeopardy of suffering serious illness. In this case, a partial guardian could be appointed by the court to make nutritional decisions for the individual.

restraint may be used for a further period of up to twelve hours and a further reassessment shall be carried out for each subsequent twelve hour period.

(5) Where an apparatus for restraining a person is applied to a resident, the apparatus shall,

(a) be designed so as not to cause physical injury to the resident;

(b) be designed so as to cause the least possible discomfort to the resident, and

(c) be examined and the resident's position changed at least every hour by a registered nurse or a registered nursing assistant.

(6) Subject to the provisions of this section, every nursing home shall have written policies and procedures governing the application and use of physical restraints on residents. O. Reg. 354/80, s. 55.

COMMITTEE'S PROPOSED LEGISLATION

(2) The order shall specify in respect of which functions the person is found to be incapable.

(3) Under an order for partial guardianship, the guardian may exercise those of the powers set out in subsection 60(2) that are specified in the order, but only in respect of the functions in respect of which the person is found to be incapable.

63.-(1) The court may, on any person's application, vary an order appointing a guardian or substitute another person as guardian.

(2) Section 55 (service of notice, parties) and subsections 56(7), (8) and (9) (visit by advocate) apply to the application, with necessary modifications.

(3) In establishing the facts necessary to support the application, the standard of proof is proof on the balance of probabilities, unless the application seeks to increase the guardian's powers, in which case the standard is proof beyond a reasonable doubt.

COMMENTARY

Guardianship Order:

Guardianship orders under the Committee's recommendations will usually be indeterminate in term. The Committee has considered and rejected the notion of court review of these orders on a periodic basis. Experience in other jurisdictions has shown that court review procedures, while theoretically of value to the person who is incapable, in practice, provide no real safeguards for the individual and result in needless expenditures of time and money. However, there may be circumstances where the court wishes to limit the term of the appointment of a guardian, or wishes to place limits on the powers of a guardian.

Substitution or Variation:

Because guardianship orders will most often be indefinite in term, guardians will have to be replaced in many cases because of incapacity, death, unwillingness to continue or impropriety. Orders will also have to be varied because of changing circumstances, e.g. the extent of the person's incapacity. This provision ensures that procedural safeguards are followed, in applications to substitute a person as guardian or vary an order of guardianship.

In an application to extend the guardian's powers the need must be established beyond reasonable doubt. If this cannot be shown, it is likely that a less intrusive, appropriate action should be taken.

EXISTING LAW

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
64.-(1) Serious illness or injury, or deprivation of liberty or personal security, are serious adverse effects for the purposes of this section.	Serious Adverse Effects: "Serious adverse effects" is defined in this subsection as serious illness or injury, or deprivation of liberty or personal security. Serious illness or injury may result where a person is incapable of making nutritional, shelter, health care or safety decisions and where the person's basic needs are not being met. Deprivation of liberty or personal security may result when a person is incapable of making personal care decisions and where people are abusing, neglecting or exploiting him or her.	
(2) If, in the opinion of the Public Guardian and Trustee, a person is incapable of personal care and prompt action is required to protect the person from serious adverse effects, the Public Guardian and Trustee shall apply to the court for an order appointing him or her as temporary guardian. (3) Notice of the application shall be served on the person alleged to be incapable, unless the court dispenses with notice in view of the nature and urgency of the matter.	Temporary Guardianship: This provision would allow the Public Guardian and Trustee to act promptly in situations where an person who is apparently incapable would be seriously affected. In these circumstances, the Public Guardian and Trustee would apply to the District Court for an order appointing him or her temporary guardian and conferring the powers necessary to prevent harm to the individual. Notice is required to be given to the person who is allegedly incapable, but the court may dispense with notice in view of the urgency of the situation.	
(4) For the purpose of an application to appoint a temporary guardian, the standard of proof that the person is incapable of personal care and that the person, as a result, is suffering or is likely to suffer serious adverse effects is proof on the balance of probabilities.	The standard of proof on an application for interim guardianship is proof on the balance of probabilities. At the stage at which a temporary guardianship application is brought, it would not be possible for the Public Guardian and Trustee to have gathered all the evidence required to prove mental incapacity for personal care beyond reasonable doubt. It is the Committee's view that, in this case, the lower standard of proof is warranted to prevent serious harm to mentally incapable persons. Where the person's mental incapacity will continue beyond the immediate crisis, the Public Guardian and Trustee or a family member or friend could apply for permanent guardianship.	

(5) The court may by order appoint the Public Guardian and Trustee as temporary guardian.

(6) The appointment is valid for a period not exceeding ninety days if notice was served on the person and not exceeding seven days if notice was dispensed with.

(7) The order shall set out the Public Guardian and Trustee's powers as temporary guardian and any conditions imposed on the guardianship.

(8) If the Public Guardian and Trustee has custodial power over the person and the court is satisfied that it may be necessary to apprehend him or her, the court may authorize the Public Guardian and Trustee to do so.

(9) In that case the Public Guardian and Trustee may, with the assistance of a police officer, enter the premises specified in the order (between 9 a.m. and 4 p.m. or during the hours specified in the order) and search for and remove the person, using such force as may be necessary.

An application for temporary guardianship would be brought by the Public Guardian and Trustee where there was evidence that a person who is apparently incapable was being neglected or abused and was not capable of extricating him or herself from the situation. While the power to appoint an interim committee of the person exists under subsection 12(3) of the Mental Incompetency Act, the power cannot effectively now be used because there is no public official to act as safety net in an application to the court. The creation of the office of Public Guardian and Trustee, combined with this provision, should result in greater protection of persons who are mentally incapable from exploitation, abuse and neglect.

A temporary application is for a period of seven days where no notice was given to the person and ninety days where notice was given to the person, but may be limited further by the court. The order could be terminated, its term reduced or extended by the District Court.

Subsection 64(8), like subsection 60(3), permits the court to authorize the guardian, in this case the Public Guardian and Trustee, to apprehend the person under guardianship, where the court is satisfied it is necessary to do so. Where force is necessary, the assistance of a police officer would be employed. In emergency situations, drastic actions may be necessary. Where a person who is incapable is being confined, neglected or abused; or, where an incapable person is suffering or at imminent risk of suffering serious illness or injury, inaction cannot be excused. It should be noted that the court making the order and the temporary guardian are under the duty imposed by section 2 to take the least restrictive and intrusive course of action that is available and appropriate in the circumstances. There are other limitations on the power. The premises must be specified in the order and the hours of entry are limited unless the order otherwise provides.

The Mental Incompetency Act, as amended

12.—(3) The court may appoint a committee to act with such powers as it may confer upon him until a scheme of management is propounded and a permanent committee appointed, and any such appointment need not be confirmed. R.S.O. 1970, c. 271, s. 12.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(10) On the application of the Public Guardian and Trustee or of the person under guardianship, the court may terminate the guardianship or reduce or extend its term. (11) An application by the person under guardianship to terminate the guardianship suspends the temporary guardian's powers, unless the court orders otherwise.		
65.-(1) The court may, on any person's application, terminate a guardianship ordered under section 54.	Termination of Guardianship: It should be at least as simple to terminate an order appointing a guardian as it is to create one. Therefore, a summary disposition procedure should exist for uncontested, termination applications. The procedure should be similar to that provided for the appointment of a guardian. The standard of proof to establish capacity for personal care should be lower than that required to prove incapacity. Those attempting prove capacity should be required only to establish it on the balance of probabilities, that is, that it is more likely than not.	
(2) The standard of proof that the person under guardianship is capable of personal care is proof on the balance of probabilities. (3) An application by the person under guardianship to terminate the guardianship suspends the guardian's powers, unless the court orders otherwise.		

66.-(1) Notice of an application to terminate a guardianship shall be served, together with the documents described in subsection 67(1),

(a) on the person under guardianship;

(b) on the guardian;

(c) on the Public Guardian and Trustee;

(d) on the person's conservator or attorney for personal care, if known.

(2) The notice and accompanying documents need not be served on the applicant.

(3) The notice and documents shall also be served on at least two of the following persons, by ordinary mail sent to their last known address, in accordance with subsection (4):

1. The spouse of the person under guardianship and the person's children who are at least sixteen years old.
2. The person's parents.
3. The person's brothers and sisters who are at least sixteen years old.
4. The person's friends who are at least sixteen years old and have been in personal contact with him or her during the preceding twelve months.

(4) All the persons described in paragraph 1 of subsection (3) who are known shall be served, and if fewer than two persons described in that paragraph are served, all the persons described in

The service of notice provisions are similar to those required on an application for the appointment of a guardian. See section 55.

the next paragraph who are known shall be served, and so on until at least two persons have been served.

(5) The parties to the application are the applicant and the persons served under clauses (1)(a), (b), (c) and (d).

(6) A person described in clause (1)(d) who has not been served, or a person described in subsection (3), whether served or not, is entitled to be added as a party at any stage in the proceeding if he or she serves a notice of appearance on every person who was served under subsection (1) and files it with proof of service.

(7) For the purposes of subsection 67(5), the applicant (except where he or she is the person under guardianship) shall ensure that an advocate receives a copy of the notice of application and of the documents described in subsections 67(1) and (2) when they are served on the parties.

67.-(1) An application to terminate a guardianship may be accompanied by one or more statements, each made in the prescribed form by a person who knows the person under guardianship and has been in personal contact with him or her during

Subsection (5) establishes who are parties to the application and subsection (6) provides that family and friends whether or not they were served with notice of the application are entitled to have themselves added as parties by serving notice of appearance on the applicant and the other persons who were served under subsection (1).

The required documentary evidence for summary disposition of the application is the statements by two professionals who have done an assessment of the person's capacity for personal care in the preceding six months. The statements of professionals and of non-professionals who are submitting evidence must be in the form prescribed by regulation. This is to assure that the documentation the twelve months preceding the notice of application.

(2) If the applicant wishes the application to be dealt with under section 63 (summary disposition), the application shall also be accompanied by two statements made in the prescribed form, one by a physician and the other by a psychiatrist, a second physician, a psychologist or a social worker.

(3) Each statement shall indicate that its maker is of the opinion that the person is capable of personal care, and shall set out the facts on which the opinion is based.

(4) Each statement referred to in subsection (2) shall indicate that its maker performed an assessment of the person's capacity during the six months preceding the notice of application and, in the case of a statement by a psychiatrist, second physician, psychologist or social worker, shall indicate that its maker is qualified to perform assessments of capacity.

(5) Except where the person under guardianship is the applicant, an advocate shall visit the person and explain to him or her the significance of the notice of application and accompanying documents and the right to oppose the application.

addresses the matters that are in issue in the application. The use of prescribed statements in place of affidavits should reduce the costs of applications.

Where the applicant for the termination of the guardianship is not the person under guardianship an advocate is required to visit and to explain the significance of the process. This will ensure that the person under guardianship can oppose the process. One major role of the advocate will be to put the person under guardianship in contact with legal representation.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(6) The applicant shall file the advocate's statement, in the prescribed form, indicating that the advocate has complied with subsection (5) or that he or she was prevented from visiting the person despite attempts to do so. (7) If the advocate was prevented from visiting the person, the statement shall also contain a detailed explanation.	Subsections (6) and (7) like similar provisions throughout the draft require the advocate who is prevented from visiting to prepare a detailed explanation of the circumstances.	
68.-(1) The registrar of the court shall submit the notice of application and accompanying documents to a judge of the court if the following conditions are satisfied: 1. No person has delivered a notice of appearance. 2. The statements referred to in subsection 67(2) (professional assessment) accompany the application. (2) On hearing the application, the judge may, (a) grant the relief sought; (b) adjourn the application and require the parties or their counsel to adduce additional evidence or make representations; or (c) order that the application, or any issue, proceed to trial, and give such directions as are just.	Section 68 requires the registrar to submit the documentation to the court for consideration when no objections in the form of notices of appearance are filed and the documentation is complete. Where the court is satisfied with the documentary evidence, it can issue an order terminating the guardianship. If the court is not satisfied it can require the parties to present further evidence or representations.	

DUTIES OF GUARDIANS AND PERSONAL ATTORNEYS

69.-(1) A guardian shall exercise his or her powers and perform his or her duties diligently and in good faith, and shall act for the incapable person's benefit.

(2) The guardian shall explain to the incapable person what the guardian's powers are and that he or she will act for the person's benefit.

(3) The guardian shall make decisions on the incapable person's behalf in accordance with the intentions the person had before becoming incapable, and shall take into consideration the incapable person's wishes, if those intentions and wishes can be ascertained.

Duties of Guardians and Attorneys for Personal Care:

One of the major deficiencies in the law governing committees of the person appointed under the Mental Incompetency Act is the absence of statutory duties. Sections 69 to 72 provide that code for guardians and for attorneys for personal care under a validated personal power of attorney. Section 72 makes the duties expressed as duties of a guardian, the duties also of an attorney for personal care. As a result of clause 50(7)(c) and subsection 72(2) any person making a substitute medical decision is subject to the duties set out in subsections 69(1), (3), (4), (5) and (11) as if he or she were the incapable person's guardian.

Subsection 1 imposes the duty to act diligently. A guardian cannot avoid making decisions or delay making decisions so that the result may cause harm to the person for whom he or she acts. The guardian must not act from any impure motive but must always act in good faith. Actions must be taken for the benefit of the person who is incapable, not for that of the family or the guardian.

This duty to explain may seem too simple, too rudimentary to seem necessary. Yet the conferring of power on people sometimes has the effect of inducing them to act autocratically.

Subsection 3 sets out the duty to make decisions as authentically as possible. Where the person's intentions expressed before the incapacity arose are known it is the guardian's duty to act in accordance with those intentions. Decisions shall also be made taking into consideration the present wishes of the person who is incapable. This duty to make authentic decisions makes it most desirable to appoint as guardian a person who is close to the person who is incapable.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(4) If no intentions and wishes can be ascertained, the guardian shall make decisions on the incapable person's behalf that are likely to promote the person's well-being.	In many situations where decisions must be made neither intentions when capable or present wishes will be ascertainable. The committee has chosen a test of "likely to promote the person's well-being" rather than a test of "best interests" because it is of the view that the best interests test has little relevance in these circumstances. It seems that in these situations the guardian would be best guided by the new test.	
(5) The guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions on his or her behalf. (6) The guardian shall, as far as possible, seek to foster the incapable person's self-reliance and independence.	Subsections 5 and 6 require the guardian to get the person who is incapable to participate to the greatest possible degree in decisions and to foster independence. The duty to foster independence may result in somewhat greater risks for the person. For example, fostering independence may involve the person being taught how to use a public transportation system to go to a recreation or learning centre. Independent use of the public transportation system may create a greater risk to the safety of the person. However, the value of independent action outweighs some risk of harm.	
(7) A guardian other than the Public Guardian and Trustee shall act in accordance with the guardianship plan. (8) The guardianship plan may be amended from time to time with the Public Guardian and Trustee's approval.	Subsections 7 and 8 are based on the notion that a guardianship plan that to the greatest possible extent will attempt to address the future for the person under guardianship. It will address such issues as where the person will live, the training that should be attempted, the recreational and social opportunities that will be presented. It is the duty of the guardian to follow that plan and where necessary to amend it with the approval of the Public Guardian and Trustee. It is anticipated that there will be an annual visit to the person under guardianship by an advocate. The visit should assist the guardian to stay informed about relevant services that could be available to the person under guardianship.	

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(9) The guardian may apply to the court for directions on any question arising in the guardianship. (10) The incapable person or his or her dependant, the conservator, the attorney under a continuing power of attorney, or any other person with leave of the court, may also apply to the court for directions to the guardian on any question arising in the guardianship.	In some guardianship situations the guardian may find him or herself in a quandry about a conflict of duties or a decision which must be made where it is unclear which course best promotes the person's well-being. The guardian should in these circumstances be allowed to ask the court for directions. Similarly there will be situations where the people who are important in the life of the incapable person including his or her friends may have doubts about a decision that the guardian proposes to take. They should be able to request the court to give directions to the guardian. The Public Guardian and Trustee is given a mandate to mediate such conflicts where there is a private guardian but in some cases agreement will not be attainable.	
(11) No proceeding for damages shall be commenced against a guardian for anything done or omitted in good faith in connection with his or her powers and duties under this Act.	Being a guardian is not an easy task. So long as the guardian acts in good faith an action should not lie against him or her for damages. Failure to comply with the other duties may result in his or her removal as guardian or changes to the powers of the guardian or some of the other remedies under the legislation.	
70.-(1) A guardian shall prepare a report in the prescribed form as of the 31st day of December in each year and shall file it with the Public Guardian and Trustee before the end of February in the following year. (2) The report shall indicate, (a) where the incapable person resides; (b) what decisions concerning the person's health care and safety were made on his or her behalf during the year; (c) whether the person objected to any decisions made on his or her behalf during the year and, if so, what those decisions were;		

(d) any proposals by the guardian for changes in the guardianship plan;

(e) whether an advocate has visited the person during the year.

71.-(1) A guardian shall promptly notify the Public Guardian and Trustee of any change in the incapable person's place of residence.

(2) The guardian shall not change the person's place of residence to a more restrictive setting unless,

(a) the Public Guardian and Trustee, and the person's conservator or the person's attorney under a continuing power of attorney, if any, consent to the change; or

(b) the court, on the guardian's application, permits him or her to make the change.

72.-(1) Sections 69, 70 and 71 also apply, with necessary modifications, to an attorney under a power of attorney for personal care that has been validated under section 45 or 46.

(2) Subsections 69(1), (3), (4), (5) and (11) also apply, with necessary modifications, to a person who makes a decision on an incapable person's behalf in accordance with section 50 (consent to treatment).

Change of Residence:

A central concept of this legislation is that of the least restrictive alternative (see section 2). Place of residence determines, to a great extent, the liberty of any individual. This provision requires a guardian intending to change the place of residence of a person who is incapable, to notify the Public Guardian and Trustee. Where the place of residence is changed to a more restrictive place, the guardian must satisfy the Public Guardian and Trustee, or the court, that the greater restriction of liberty is justified in the circumstances.

Section 72 makes the duties of a guardian applicable to an attorney for personal care and some applicable to a person authorized to make substitute medical and psychiatric treatment decisions.

PART III

MISCELLANEOUS

73.-(1) If a person's capacity is in issue in a proceeding under this Act and the court is satisfied that there are reasonable grounds to believe that the person is incapable, the court may, on motion or on its own initiative, order that the person be examined by a psychiatrist, physician, psychologist or social worker named in the order, or by more than one such person, for the purpose of giving an opinion as to the person's capacity.

(2) The order may require the person,

(a) to submit to the examination;

(b) to permit entry to his or her residence for the purposes of the examination;

(c) to attend at such other places and at such times as are specified in the order.

(3) An examination under this section shall, if possible, be conducted in the person's home.

Assessment of Capacity:

This provision enables the court to order that a person who is the subject of an application under the Act submit to an examination of his or her capacity. It would replace the existing subsection 10(2) of the Mental Incompetency Act and is equivalent to subsection 45(5) of the Provincial Offences Act, which deals with the capacity of defendants to conduct their own defence. The provision pertains to proceedings for the appointment of a conservator, temporary conservator, guardian or temporary guardian and for the termination of a conservatorship or guardianship.

Priority is given to examinations in the home of the person to be assessed. This minimizes agitation and stress and it is felt that familiar surroundings are more conducive to an accurate assessment.

An order is explained to the person by an advocate who will also advise the person on options remaining open to him or her. A failed attempt serves to justify enforcement provisions, particularly where someone bars access to the person and abuse is suspected.

The Mental Incompetency Act, as amended

10.—(2) The court may by order require an alleged mentally incompetent person to attend and submit to examination by one or more medical practitioners at such time and place as the order directs. R.S.O. 1970, c. 271, s. 10.

(4) When an order has been made under subsection (1) the court may, on motion, order the Public Guardian and Trustee, together with a police officer, to apprehend the person whose capacity is in issue and take him or her into custody, if the court is satisfied that,

(a) the examiner named in the first order has made all efforts that are reasonable in the circumstances to visit the person in order to conduct the examination;

(b) the examiner was prevented from visiting the person by the actions of the person or of others; and

(c) the examination can not be conducted by means of a course of action that is less intrusive than an order under this subsection.

(5) The motion shall be accompanied by,

(a) an advocate's written statement that he or she has visited the person and has explained the order for examination;

(b) if the advocate has been prevented from visiting the person to explain the order, the advocate's written statement that he or she made efforts to do so, with an explanation why the efforts were unsuccessful.

Enforcement:

The enforcement provisions are an exercise of the police power of the state and may involve forcible entry. Therefore, they deserve utmost scrutiny. The Committee believes the power is necessary to deal with the exploitation, abuse and neglect of persons who are mentally disadvantaged.

Without an enforcment order, it would be possible for those who have actual custody of a person who is alleged to be incapable to prevent the court from making a determination of the issue. This would result in an individual who is mentally incapable being denied the protection of law.

The Committee has considered and rejected legislation directed specifically at abuse and neglect of persons who are mentally incapable. Interventionist legislation specific to neglect and abuse tends to result in unnecessary institutionalization of persons who are mentally disadvantaged. As set out in the Values section of this Report, the Committee strongly opposes unnecessary intervention and favours self-determination and community living solutions, wherever possible. The Criminal law process can be used to punish those who intentionally harm persons who are mentally incapable.

The enforcement provisions are a major component in the Committee's generalized approach to neglect and abuse of persons who are mentally incapable. That approach is intended to work as follows.

The establishment of the office of Public Guardian and Trustee will provide a safety net. Public health nurses, community agencies and others who discover a situation where there is grounds to believe that a person who is mentally incapable is being financially exploited, abused or neglected will be able to inform the office and provide the evidence gathered. Where action is urgently needed, the legislation will have provisions for temporary conservatorship and guardianship by the Public Guardian

(6) The order is valid for seven days.

(7) The Public Guardian and Trustee and the police officer may enter the premises specified in the order (between 9 a.m. and 4 p.m. or during the hours specified in the order) and may search for and remove the person, using such force as may be necessary.

(8) The person shall not be held in custody longer than is necessary for the purposes of the examination, and in any case not for a period exceeding seventy-two hours, and while in custody

and Trustee. The enforcement provisions would be used to obtain an assessment of capacity where there has been refusal to permit access to the person who is allegedly incapable. The availability of support for the capacities of the individual would permit non-institutional resolution of some situations. Conservatorship and guardianship would be available by court order where appropriate.

The forcible entry would be made only where no other course of action was reasonable. The process would be under the direction of the District Court and would involve the Public Guardian and Trustee. It is hoped that in practice the existence of an enforcement provision will result in voluntary compliance with the court order for an examination.

Subsection (6) is consistent with subsection 9(5) of the Mental Health Act. In some cases, implementation may be difficult. Seven days allows the Public Guardian and Trustee time to arrange police assistance to apprehend the person.

Subsection (7) sets out reasonable hours during which the order can be carried out, unless otherwise ordered by the court. The provision respects privacy of the individual and prohibits "midnight raids" which would only serve to exacerbate problems with apprehension.

Subsection (8) limits apprehension of a person for the purpose of an examination to 72 hours. This period is consistent with the recent reduction of detainment in subsection 9(5)(b) of the Mental Health Act from 120 to 72 hours.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
shall not be confined in a manner that exceeds what is necessary for the purposes of the examination.	Ideally, a proper examination necessitates seeing a person on more than one occasion, probably on separate days, as a person's apparent capacity can vary greatly at any one time for a variety of reasons. Some examinations are extensive and time-consuming, such as neurological exams. The 72-hour period is justified to allow for these complete examinations. Persons taken into custody involuntarily will require time to calm down before an examination can be initiated. Otherwise, their agitated state would prejudice assessments and increase the likelihood of finding incapacity.	
(9) An order made under subsection (1) or (4) authorizes a hospital as defined in the Public Hospitals Act to admit the person and to facilitate the examination.		
74. For the purposes of this Act, a statement in the prescribed form that purports to be signed by its maker is admissible in evidence without proof of his or her signature, office or professional qualifications.	Statements As Evidence: A large part of the cost of court proceedings related to the appointment of a substitute decision maker under the Mental Incompetency Act is the cost of obtaining affidavit evidence. An affidavit is a written statement made under oath or affirmed, that is, stating that the contents of the written statement are true. To avoid unnecessary costs in connection with applications, the draft requires, or provides for, written statements certifying facts and opinions. This provision would permit these written statements to be admitted in evidence and serve the role provided by affidavits. There could be cross-examination on written statements as there is on affidavits. Subsection 76(4) makes it an offence to make a false statement and subsection 76(5) makes it punishable by a fine of up to $10,000.00	

75. If a dispute arises between a person's guardian or attorney for personal care and his or her conservator or attorney under a continuing power of attorney, in the performance of their duties, the Public Guardian and Trustee shall mediate between them and seek to resolve the dispute.

76.-(1) No person shall hinder or obstruct,

(a) a person who is conducting an examination ordered under section 73, or is seeking to do so;

(b) an advocate who is visiting a person in accordance with this Act, or is seeking to do so.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable, on conviction, to a fine not exceeding $5,000.

(3) Subsection (1) does not apply to the person who is the subject of the order for examination or whom the advocate is visiting or seeking to visit.

(4) No person shall, in a statement made in a prescribed form, assert something that he or she knows to be untrue or profess an opinion that he or she does not hold.

Mediation by Public Guardian and Trustee:

Conflicts will arise between individuals making personal decisions for a person who is incapable and those making property decisions for that individual. The purpose of this provision is to allow the Public Guardian and Trustee to mediate these types of disputes to avoid unnecessary applications to the courts.

Offences:

Section 76 creates two basic offences. The first is obstructing a person conducting an examination ordered by the court or an advocate attempting to perform his duty to visit and inform under the legislation. It is aimed at persons having custody, in fact, of the person who is allegedly incapable, who are preventing an assessment. The person who is the subject of the court order for examination or the person being visited cannot be convicted of the offence. The prosecution of a person alleged to be incapable would be neither effective nor appropriate.

The second offence is making a false statement in a prescribed form under the legislation. The effect of a false statement used in evidence to appoint a guardian or conservator can have drastic effects for the person who is the subject of the application. Much harm can be done to another individual.

COMMITTEE'S PROPOSED LEGISLATION	COMMENTARY	EXISTING LAW
(5) A person who contravenes subsection (4) is guilty of an offence and is liable, on conviction, to a fine not exceeding $10,000.	A maximum fine of $5000.00 is provided for obstruction and a maximum of $10,000.00 for knowingly making a false statement.	
77. The Lieutenant Governor in Council may make regulations, (a) prescribing classes of persons for the purposes of the definition of "advocate"; (b) prescribing forms; (c) prescribing a fee scale for conservators' compensation, including annual percentage charges on revenue and on capital.		
78. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.		
79. The short title of this Act is the Substitute Decisions Act, 1987.		

7-CS

BILL **1987**

A Draft Act to provide for the making of Decisions on behalf of Adults concerning the Management of their Property and concerning their Personal Care

CONTENTS

Section

1. Definitions
2. Least restrictive course of action preferred
3. Presumption of capacity
4. Counsel for person whose capacity is in issue

PART I

PROPERTY

5. Part applies to persons at least eighteen years old
6. Incapacity to manage property

Powers of attorney for property

7. General power of attorney for property
8. Continuing power of attorney
9. Execution of continuing power
10. Termination of continuing power
11. Exercise of power after termination or invalidity

Statutory conservators

12. Public Guardian and Trustee as statutory conservator
13. Designation of preferred conservator
14. Professional assessment of capacity, with person's consent
15. Application to replace Public Guardian and Trustee
16. Review by court
17. Where statutory conservator ceases to act
18. Automatic termination

Court-appointed conservators

19. Application for appointment
20. Service of notice
21. Accompanying documents

22. Summary disposition
23. Conservator
24. Order
25. Variation
26. Temporary conservator in urgent case
27. Application for termination
28. Service of notice
29. Evidence on application
30. Summary disposition

Property management

31. Authority of conservator
32. Duty of conservator
33. Liability of conservator
34. Attorney under continuing power
35. Guiding principles for expenditures
36. Application for directions
37. Compensation
38. Annual financial statement
39. Passing of accounts

PART II

THE PERSON

40. Part applies to persons at least sixteen years old
41. Incapacity for personal care

Powers of attorney for personal care

42. Power of attorney for personal care
43. Designation of preferred guardian
44. Execution of power of attorney for personal care
45. Application for validation
46. Validation if Public Guardian and Trustee is attorney
47. Assessment of grantor's capacity
48. Termination of power of attorney for personal care

Consent to psychiatric and medical treatment

49. Definitions
50. Consent on person's behalf
51. Visit by advocate
52. Second opinion in certain cases
53. Emergency treatment

Court appointment of guardians

54. Application for appointment
55. Service of notice

56. Accompanying documents
57. Summary disposition
58. Guardian
59. Order
60. Full guardianship
61. Restraint or confinement to prevent serious bodily harm
62. Partial guardianship
63. Variation
64. Temporary guardian in urgent case
65. Application for termination
66. Service of notice
67. Statements of witnesses
68. Summary disposition

Duties of guardians and attorneys for personal care

69. Duty of guardian
70. Annual report
71. Change of person's residence
72. Attorney for personal care

PART III

MISCELLANEOUS

73. Order for examination
74. Statements as evidence
75. Mediation
76. Offences
77. Regulations
78. Commencement
79. Short title

Definitions

1.-(1) In this Act,

"advocate" means a person who is a member of a prescribed class;

"capable" means mentally capable and "capacity" has a corresponding meaning;

"court" means the District Court of Ontario;

"dependant" means a person to whom another has an obligation to provide support;

"incapable" means mentally incapable and "incapacity" has a corresponding meaning;

"physician" means a legally qualified medical practitioner;

"prescribed" means prescribed by the regulations made under this Act;

"psychiatrist" means a physician who holds a specialist's certificate in psychiatry issued by The Royal College of Physicians and Surgeons of Canada;

R.S.O.1980, c.404

"psychologist" means a registered psychologist as defined in the Psychologists Registration Act;

"social worker" means a person whom the Ontario College of Certified Social Workers has authorized to use the designation "Certified Social Worker";

"spouse" means a person of the opposite sex,

(a) to whom the person is married; or

(b) with whom the person is living in a conjugal relationship outside marriage, if the two persons,

(i) have cohabited for at least one year,

(ii) are together the parents of a child, or

1986,c.4

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act, 1986*.

Meaning of "explain"

(2) When this Act requires that an advocate or other person explain a matter, the advocate or other person satisfies that requirement if he or she explains the matter to the best of his or her ability, whether the person receiving the explanation understands it or not.

Least restrictive course of action preferred

2. When this Act authorizes a person to take action in respect of another's property or person, the person shall choose the least restrictive and intrusive course of action that is available and is appropriate in the particular case.

Presumption of capacity

3.-(1) A person is presumed to be capable of entering into a contract and of giving consent.

Exception

(2) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving consent.

Onus of proof: setting aside contract

(3) In an action to set aside a contract entered into by a person while his or her property was under conservatorship or within six months before the creation of the conservatorship, the onus of proof that the defendant did not have reasonable grounds to believe that the person was incapable is on the defendant.

Idem: gift

(4) Subsection (3) also applies, with necessary modifications, to an action to set aside a gift.

Counsel for person whose capacity is in issue

4.-(1) In a proceeding under this Act in which a person's capacity is in issue,

(a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person;

(b) the person shall be deemed to have capacity to retain and instruct counsel.

Responsibility for legal fees

R.S.O.1980, c.234

(2) If legal representation is provided for a person in accordance with clause (1)(a) and no certificate is issued under the Legal Aid Act in connection with the proceeding, the person is responsible for the legal fees.

PART I

PROPERTY

Part applies to persons at least eighteen years old

5.-(1) This Part applies to decisions on behalf of persons who are at least eighteen years old.

Attorney or conservator must be at least eighteen years old

(2) To exercise a power of decision under this Part on behalf of another person, a person must be at least eighteen years old.

Incapacity to manage property

6. A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not

able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

POWERS OF ATTORNEY FOR PROPERTY

General power of attorney for property

7.-(1) A person may give a written power of attorney for property, authorizing the person or persons named as attorneys to do on the grantor's behalf anything in respect of property that the grantor could do, except make a will.

Public Guardian and Trustee may be attorney

(2) A power of attorney may name the Public Guardian and Trustee as attorney.

Conditions

(3) A power of attorney is subject to the conditions that are contained in it.

Form

(4) A power of attorney may be in the prescribed form.

Continuing power of attorney

8.-(1) A power of attorney that expressly states that the authority given may be exercised during any subsequent incapacity of the grantor to manage property is a continuing power of attorney and remains valid despite the grantor's subsequent incapacity.

Idem

(2) A continuing power of attorney is subject to this Part, and to the conditions that are contained in the power of attorney and are consistent with this Act.

Execution of continuing power

9.-(1) A continuing power of attorney shall be executed in the presence of two witnesses in the manner described in subsection (3).

Persons who shall not be witnesses

(2) The following persons shall not be witnesses:

1. The attorney or his or her spouse.
2. The grantor's spouse.
3. A person who is related to the grantor or attorney by blood, adoption or marriage or whom the grantor or attorney has demonstrated a settled intention to treat as his or her child.
4. The owner, manager, agent or employee of a facility where the grantor is a boarder or receives other personal care.
5. A person who is a party to a proceeding to which the grantor is also a party.
6. A person whose property is under conservatorship or who has a guardian.

Formalities of execution by witnesses

(3) Each witness shall sign the document as witness and shall at the same time make a written statement in the prescribed form indicating that, in his or her opinion, at the time of executing the power the grantor was capable of managing property.

Termination of continuing power of attorney

10.-(1) A continuing power of attorney is terminated,

(a) when the attorney dies, becomes incapable or resigns, if the power does not provide for the substitution of another person or if no such person is able and willing to act;

(b) when the Public Guardian and Trustee becomes statutory conservator under section 12 or 14, subject to section 15;

(c) when the court appoints a conservator under section 19;

(d) when the power is revoked.

Execution of revocation

(2) The revocation shall be in writing and shall be executed in the same way as a continuing power of attorney.

Exercise of power after termination or invalidity

11. If a power of attorney is terminated or becomes invalid, any subsequent exercise of the power by the attorney is nevertheless valid as between the grantor or the grantor's estate and any person, including the attorney, who acted in good faith and without knowledge of the termination or invalidity.

STATUTORY CONSERVATORS

Public Guardian and Trustee as statutory conservator

R.S.O. 1980, c.262

12. If a certificate is issued under the Mental Health Act certifying that a person who is a patient of a psychiatric facility as defined in that Act is incapable of managing property, the Public Guardian and Trustee is the person's statutory conservator.

Designation of preferred conservator

13.-(1) A person may designate the person, including the Public Guardian and Trustee, whom the person wishes to be his or her statutory conservator or wishes the court to appoint as conservator in the event of his or her incapacity to manage property.

Execution of designation

(2) The designation shall be in writing and shall be executed in the same way as a continuing power of attorney.

Professional assessment of capacity, with person's consent

14.-(1) If a person's capacity to manage property is in issue, a psychiatrist, physician, psychologist or social worker may perform an assessment of the person's capacity.

Conditions

(2) The assessment shall not be performed unless the person is first informed,

(a) of the purpose of the assessment;

(b) of the significance and effect of a certificate of incapacity; and

(c) of his or her right to refuse to be assessed.

Certificate of incapacity

(3) If the person who performs the assessment concludes that the person assessed is incapable of managing property, he or she may complete and sign a certificate of incapacity in the prescribed form.

Copies to be given to Public Guardian and Trustee and to advocate

(4) The person who performs the assessment shall ensure that copies of the certificate of incapacity are given to the Public Guardian and Trustee and to an advocate.

Advocate to visit person

(5) An advocate shall promptly visit the person to whom the certificate relates and shall,

(a) notify the person of the certificate of incapacity;

(b) explain the significance and effect of the certificate;

(c) inform the person of his or her right to refuse the statutory conservatorship; and

(d) ask the person whether he or she wishes to refuse the statutory conservatorship.

Notice to Public Guardian and Trustee

(6) The advocate shall promptly notify the Public Guardian and Trustee in writing that the visit took place and whether the person to whom the certificate applies refuses the statutory conservatorship.

Statutory conservatorship

(7) As soon as he or she receives the advocate's notification that the person does not refuse the statutory conservatorship, the Public Guardian and Trustee is the person's statutory conservator.

Application to replace Public Guardian and Trustee

15.-(1) Any of the following persons may apply to the Public Guardian and Trustee to replace him or her as an incapable person's statutory conservator:

1. The attorney under the person's continuing power of attorney.
2. A person designated under section 13 as the person's preferred conservator.

Idem

(2) If no application has been made under subsection (1), any of the following persons may apply to the Public Guardian and Trustee to replace him or her as the person's statutory conservator:

1. The person's spouse, child, parent, brother or sister.
2. The person's friend.

Form of application

(3) The application shall be in the prescribed

form and shall be accompanied by a management plan for the property in the prescribed form.

Statement

(4) The application shall contain a statement indicating that the applicant has been in personal contact with the incapable person during the preceding twelve month period, that their relationship is friendly and that the applicant is willing to perform all duties in respect of the incapable person's property.

Surety bond

(5) An application by an applicant described in subsection (2) (relative or friend) shall be accompanied by a surety bond for the value of the property.

Idem

(6) The court may, on application, order that the requirement for a surety bond be dispensed with or that the amount required be reduced, and may make its order subject to conditions.

Certificate

(7) If the Public Guardian and Trustee is satisfied that the applicant is suitable to manage the property and that the management plan is appropriate, the Public Guardian and Trustee shall certify that the applicant is statutory conservator in his or her place and has power to act as such.

Two or more conservators

(8) The Public Guardian and Trustee may certify that two or more applicants are joint statutory conservators, or that each of them is statutory conservator for a specified part of the property.

Duty of conservator

(9) A person who replaces the Public Guardian and Trustee as statutory conservator shall administer the property in accordance with the management plan, subject to any conditions imposed by the court.

Review by court

16.-(1) If the Public Guardian and Trustee refuses to issue a certificate for a statutory conservator under subsection 15(7) and the applicant disputes the refusal, the Public Guardian and Trustee shall apply to the court to decide the matter.

Idem

(2) The court shall decide whether the applicant should, in the circumstances, replace the Public Guardian and Trustee.

Criteria

(3) In the case of a dispute by an applicant described in subsection 15(2) (relative or friend), the court shall also take into consideration the incapable person's wishes and the closeness of the applicant's personal relationship to the person.

Order

(4) The court may, in its order, impose such conditions on the conservator's powers as it considers appropriate.

Where statutory conservator ceases to act

17.-(1) If a statutory conservator ceases to act as such for any reason, the Public Guardian and Trustee may act as the incapable person's statutory conservator until a new application under section 15 (application to Public Guardian and Trustee) or an application under section 19 (court application) has been disposed of.

Idem

(2) The Public Guardian and Trustee shall act as conservator if he or she is satisfied that it is necessary to do so in order to prevent harm.

Automatic termination

18.-(1) A statutory conservatorship is terminated by the following events:

R.S.O.1980, c.262

1. Notice to the conservator under section 40 of the Mental Health Act that the certificate of incapacity to manage property has been cancelled.
2. Notice to the conservator that the patient has been discharged, unless the conservator has also received a notice of continuance under subsection 41(2) of the Mental Health Act.
3. The expiration of six months after the patient's discharge, if a notice of continuance has been given.
4. The expiration of the time for an appeal from a decision by the review board under the Mental Health Act that the person is capable of managing property, if no appeal is taken, or if an appeal is taken, its final disposition.
5. The appointment of a conservator by the court under section 19.
6. Subject to subsections (2) and (3), in the case of a statutory conservatorship created under section 14 (professional assessment), notice by the person under conservatorship to the conservator that the conservatorship is terminated.
7. In the case of a statutory conservatorship created under section 14 (professional assessment), notice by the conservator to the person under conservatorship and to the Public

Guardian and Trustee that the conservatorship is terminated.

Termination of conservatorship created by certificate of incapacity

(2) When the conservator receives the notice referred to in paragraph 6 of subsection (1), he or she shall cause an advocate to visit the person who gave the notice.

Idem

(3) The conservatorship is not terminated until the advocate makes a statement in writing to the Public Guardian and Trustee certifying that he or she has visited the person who gave the notice, has explained its significance and is satisfied that the person wishes to terminate the conservatorship.

Notices to be forwarded to conservator

(4) If the Public Guardian and Trustee receives a notice concerning a statutory conservatorship although he or she is not the statutory conservator, he or she shall ensure that it is promptly forwarded to the conservator.

COURT-APPOINTED CONSERVATORS

Application for appointment

19.-(1) The court may, on any person's application, appoint a conservator for a person who is incapable of managing property and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.

Idem

(2) An application may be made under subsection (1) even though there is a statutory conservator.

Standard of proof

(3) The standard of proof that a person is incapable of managing property and, as a result, needs decisions to be made on his or her behalf by

a person who is authorized to do so, is proof beyond a reasonable doubt.

Service of notice

20.-(1) Notice of an application to appoint a conservator shall be served, together with the documents described in subsections 21(1) and (2),

(a) on the person alleged to be incapable of managing property;

(b) on the Public Guardian and Trustee;

(c) on the proposed conservator;

(d) on the following persons, if known:

1. The guardian of the person alleged to be incapable.
2. The person's attorney for personal care.
3. The attorney under the person's continuing power of attorney.
4. The preferred conservator designated by the person under section 13.

Idem

(2) The notice and accompanying documents need not be served on the applicant.

Service on family and friends by ordinary mail

(3) The notice and accompanying documents shall also be served on at least two of the following persons, by ordinary mail sent to their last known address, in accordance with subsection (4):

1. The spouse of the person alleged to be incapable and the person's children who are at least eighteen years old.
2. The person's parents.
3. The person's brothers and sisters who are at least eighteen years old.

4. The person's friends who are at least eighteen years old and have been in personal contact with him or her during the preceding twelve months.

Idem

(4) All the persons described in paragraph 1 of subsection (3) who are known shall be served, and if fewer than two persons described in that paragraph are served, all the persons described in the next paragraph who are known shall be served, and so on until at least two persons have been served.

Parties

(5) The parties to the application are the applicant and the persons served under clauses (1)(a), (b), (c) and (d).

Idem

(6) A person described in clause (1)(d) who was not served, or a person described in subsection (3), whether served with notice of the application or not, is entitled to be added as a party at any stage in the proceeding if he or she serves a notice of appearance on every person who was served under subsection (1) and files it with proof of service.

Notice and accompanying documents to be given to advocate

(7) For the purposes of subsection 21(6), the applicant shall ensure that an advocate receives a copy of the notice of application and of the accompanying documents when they are served on the parties.

Accompanying documents

21.-(1) An application to appoint a conservator shall be accompanied by,

(a) the proposed conservator's consent;

(b) a plan of management of the property in the prescribed form; and

(c) if the proposed conservator is not the Public Guardian and Trustee, one of the following:

1. The Public Guardian and Trustee's certificate that he or she has examined and approved the plan of management, has assessed the proposed conservator and any arrangements for bonding and does not object to the appointment.

2. The Public Guardian and Trustee's reasons for not giving the certificate.

Statements of witnesses

(2) If the applicant wishes the application to be dealt with under section 22 (summary disposition), it shall also be accompanied by,

(a) two statements, each made in the prescribed form by a person who knows the person alleged to be incapable and has been in personal contact with him or her during the twelve months preceding the notice of application;

(b) if only one statement described in clause (a) can be obtained, that statement as well as a statement made in the prescribed form by a psychiatrist, physician, psychologist or social worker;

(c) if no statement described in clause (a) can be obtained, two statements, each made in the prescribed form by a psychiatrist, physician, psychologist or social worker.

Contents of statements

(3) Each statement shall,

(a) indicate that its maker is of the opinion that the person is incapable of managing property, and set out the facts on which the opinion is based;

(b) indicate that its maker can expect no direct or indirect pecuniary benefit as the result of the appointment of a conservator.

Idem

(4) The statement may also indicate that its maker is of the opinion that the person needs decisions to be made on his or her behalf by a person who is authorized to do so and, in that case, shall set out the facts on which the opinion is based.

Idem

(5) Each statement described in clause (2)(b) shall indicate that its maker performed an assessment of the person's capacity during the six months preceding the notice of application.

Advocate to visit person

(6) An advocate shall visit the person alleged to be incapable of managing property and explain to him or her the significance of the notice of application and accompanying documents and the right to oppose the application.

Statement of advocate to be filed

(7) The applicant shall file the advocate's statement, in the prescribed form, indicating that the advocate has complied with subsection (6), or that he or she was prevented from visiting the person despite attempts to do so.

Idem

(8) If the advocate was prevented from visiting the person, the statement shall contain a detailed explanation.

Summary disposition

22.-(1) The registrar of the court shall submit the notice of application and accompanying documents to a judge of the court if the following conditions are satisfied:

1. No person has delivered a notice of appearance.
2. The statements referred to in subsection 21(2) (statements of witnesses) accompany the application.
3. At least one of the statements referred to in subsection 21(2) indicates that its maker is of the opinion that the person needs decisions to be made on his or her behalf by a person who is authorized to do so.

Order

(2) On hearing the application, the judge may,

(a) grant the relief sought;

(b) adjourn the application and require the parties or their counsel to adduce additional evidence or make representations; or

(c) order that the application, or any issue, proceed to trial, and give such directions as are just.

Who may not be appointed conservator

23.-(1) A person who provides residential, social, health care, training or support services to an incapable person for compensation shall not be appointed his or her conservator.

Exception

(2) Subsection (1) does not apply to members of the incapable person's family or to the following persons:

1. The guardian.
2. The attorney for personal care.

3. The attorney under a continuing power of attorney.

4. The preferred conservator designated under section 13.

Criteria

(3) Except in the case of an application that is being dealt with under section 22 (summary disposition), the court shall consider,

(a) whether the proposed conservator is the attorney under a continuing power of attorney or has been designated as preferred conservator under section 13;

(b) the incapable person's wishes, if known; and

(c) the closeness of the applicant's personal relationship to the incapable person.

Two or more conservators

(4) The court may, with their consent, appoint two or more persons as joint conservators or may appoint each of them as conservator for a specified part of the property.

Order to include finding of incapacity, etc.

24.-(1) An order appointing a conservator for a person's property shall include a finding that the person is incapable of managing property and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.

Contents of order

(2) An order appointing a conservator may,

(a) require that the conservator post security in the manner and amount that the court considers appropriate;

(b) make the appointment for a limited term as the court considers appropriate;

(c) impose such conditions on the appointment as the court considers appropriate.

Variation

25.-(1) The court may, on any person's application, vary an order appointing a conservator or substitute another person as conservator.

Notice, etc.

(2) Section 20 (service of notice, parties) and subsections 21(6), (7) and (8) (visit by advocate) apply to the application, with necessary modifications.

Standard of proof

(3) In establishing the facts necessary to support the application, the standard of proof is proof on the balance of probabilities.

Serious adverse effects

26.-(1) Loss of a significant part of a person's property, or failure to provide necessities of life for oneself or for one's dependants, are serious adverse effects for the purposes of this section.

Temporary conservator in urgent case

(2) If, in the opinion of the Public Guardian and Trustee, a person is incapable of managing property and prompt action is required to prevent serious adverse effects, the Public Guardian and Trustee shall apply to the court for an order appointing him or her as temporary conservator.

Notice

(3) Notice of the application shall be served on the person alleged to be incapable, unless the court dispenses with notice in view of the nature and urgency of the matter.

Standard of proof

(4) For the purpose of an application to appoint a temporary conservator, the standard of proof that the person is incapable of managing property and

that, as a result, the person is suffering or is likely to suffer serious adverse effects is proof on the balance of probabilities.

Order appointing temporary conservator

(5) The court may by order appoint the Public Guardian and Trustee as temporary conservator for a period not exceeding ninety days.

Idem

(6) The order shall set out the temporary conservator's powers and any conditions imposed on the conservatorship.

Termination, variation of term

(7) On the application of the Public Guardian and Trustee or of the person whose property is under conservatorship, the court may terminate the conservatorship or reduce or extend its term.

Suspension of temporary conservator's powers

(8) An application by the person whose property is under conservatorship to terminate the conservatorship suspends the temporary conservator's powers, unless the court orders otherwise.

Application for termination

27.-(1) The court may, on any person's application, terminate a conservatorship created under section 19.

Standard of proof

(2) The standard of proof that the person whose property is under conservatorship is capable of managing property is proof on the balance of probabilities.

Suspension of conservator's powers

(3) An application by the person whose property is under conservatorship to terminate the

conservatorship suspends the conservator's powers, unless the court orders otherwise.

Service of notice

28.-(1) Notice of an application to terminate a conservatorship shall be served, together with the documents described in subsection 29(1),

(a) on the person whose property is under conservatorship;

(b) on the conservator;

(c) on the Public Guardian and Trustee;

(d) on the person's guardian or attorney for personal care, if known.

Idem

(2) The notice and accompanying documents need not be served on the applicant.

Service on family and friends by ordinary mail

(3) The notice and accompanying documents shall also be served on at least two of the following persons, by ordinary mail sent to their last known address, in accordance with subsection (4):

1. The spouse of the person whose property is under conservatorship and the person's children who are at least eighteen years old.
2. The person's parents.
3. The person's brothers and sisters who are at least eighteen years old.
4. The person's friends who are at least eighteen years old and have been in personal contact with him or her during the preceding twelve months.

Idem

(4) All the persons described in paragraph 1 of subsection (3) who are known shall be served, and if fewer than two persons described in that paragraph are served, all the persons described in

the next paragraph who are known shall be served, and so on until at least two persons have been served.

Parties

(5) The parties to the application are the applicant and the persons served under clauses (1)(a), (b), (c) and (d).

Idem

(6) A person described in clause (1)(d) who was not served, and a person described in subsection (4), whether served with notice of the application or not, is entitled to be added as a party at any stage in the proceeding if he or she serves a notice of appearance on every person who was served under subsection (1) and files it with proof of service.

Notice and accompanying documents to be given to advocate

(7) For the purposes of subsection 29(4), the applicant (except where he or she is the person whose property is under conservatorship), shall ensure that an advocate receives a copy of the notice of application and of the documents described in subsection 29(1) when they are served on the parties.

Statements of witnesses

29.-(1) If the applicant wishes the application to be dealt with under section 30 (summary disposition), it shall also be accompanied by,

(a) two statements, each made in the prescribed form by a person who knows the person whose property is under conservatorship and has been in personal contact with him or her during the twelve months preceding the notice of application;

(b) if only one statement described in clause (a) can be obtained, that statement as well as a statement made in the prescribed form by a psychiatrist, physician, psychologist or social worker;

(c) if no statement described in clause (a) can be obtained, two statements, each made in the prescribed form by a psychiatrist, physician, psychologist or social worker.

Contents of statements

(2) Each statement shall,

(a) indicate that the maker of the statement is of the opinion that the person is capable of managing property, and set out the facts on which the opinion is based; and

(b) indicate that the maker of the statement can expect no direct or indirect pecuniary benefit as the result of the termination of the conservatorship.

Idem

(3) Each statement described in clause (1)(b) shall indicate that its maker performed an assessment of the person's capacity during the six months preceding the application.

Advocate to visit person

(4) Except where the person whose property is under conservatorship is the applicant, an advocate shall visit the person and explain to him or her the significance of the notice of application and accompanying documents and the right to oppose the application.

Statement of advocate to be filed

(5) The applicant shall file the advocate's statement, in the prescribed form, indicating that the advocate has complied with subsection (4) or

that he or she was prevented from visiting the person despite attempts to do so.

Idem

(6) If the advocate was prevented from visiting the person, the statement shall contain a detailed explanation.

Summary disposition

30.-(1) The registrar of the court shall submit the notice of application and accompanying documents to a judge of the court if the following conditions are satisfied:

1. No person has delivered a notice of appearance.
2. The statements referred to in subsection 29(1) (statements of witnesses) accompany the application.

Order

(2) On hearing the application, the judge may,

(a) grant the relief sought;

(b) adjourn the application and require the parties or their counsel to adduce additional evidence or make representations; or

(c) order that the application, or any issue, proceed to trial, and give such directions as are just.

PROPERTY MANAGEMENT

Powers of conservator

31.-(1) A conservator has power to do on the incapable person's behalf anything in respect of property that the person could do if capable, except make a will.

Idem

(2) The conservator's powers are subject to this Act and to any conditions imposed by the court.

Duty of conservator

32.-(1) A conservator shall exercise his or her powers and perform his or her duties with honesty and integrity and in good faith, for the incapable person's benefit.

Explanation

(2) The conservator shall explain to the incapable person what the conservator's powers are and that he or she will act for the person's benefit.

Idem

(3) A conservator shall encourage the incapable person to participate, to the best of his or her abilities, in the conservator's decisions about the property.

Idem

(4) A conservator who does not receive compensation for managing the property shall exercise the degree of care, diligence and skill that a business person of average prudence would exercise in the conduct of his or her own affairs.

Idem

(5) A conservator who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.

Public Guardian and Trustee

(6) Subsection (5) applies to the Public Guardian and Trustee.

Management plan

(7) A conservator other than the Public Guardian and Trustee shall act in accordance with the management plan established for the property.

Amendment of plan

(8) The management plan may be amended from time to time with the Public Guardian and Trustee's approval.

Application of R.S.O.1980, c.512

(9) The Trustee Act does not apply to the exercise of a conservator's powers or the performance of his or her duties.

Liability of conservator

33.-(1) A conservator is liable for damages resulting from a breach of his or her duty.

Idem

(2) If the court is satisfied that a conservator who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the conservator from all or part of the liability.

Attorney under continuing power

34. Section 32, except subsections (7) and (8), and section 33 also apply, with necessary modifications, to an attorney acting under a continuing power of attorney whose grantor is incapable of managing property.

Guiding principles for expenditures

35.-(1) A conservator shall make the following expenditures from the incapable person's property:

1. The expenditures that are necessary to satisfy the person's legal obligations.
2. The expenditures that are reasonably necessary for the support, education and care of the person and his or her dependants, taking into account their accustomed standard of living.

Idem

(2) Subject to subsections (3) and (4), a conservator may make the following expenditures from the incapable person's property:

1. Gifts or loans to the person's friends and relatives.
2. Charitable gifts that in total do not, in any one year, exceed 20 per cent of the income of the property in that year.

Property must be sufficient

(3) Expenditures shall be made under subsection (2) only if the property is and will remain more than sufficient to satisfy the requirements of subsection (1).

Person's wishes and intentions

(4) Expenditures shall be made under subsection (2) only if there is reason to believe, based on the intentions the incapable person expressed before becoming incapable and on the wishes he or she expresses, that the person would make the expenditures if capable.

Increase of amount of charitable gifts

(5) The court may, on the conservator's application, authorize him or her to make a charitable gift that exceeds the maximum amount referred to in subsection (2).

Expenditures deemed to be for person's benefit

(6) Expenditures made under this section shall be deemed to be for the incapable person's benefit.

Application for directions

36.-(1) A conservator or an attorney under a continuing power of attorney may apply to the court for directions on any question arising in the administration of the property.

Idem

(2) The incapable person or his or her

dependant, the guardian, the attorney for personal care, or any other person with leave of the court, may also apply to the court for directions to the conservator or attorney on any question arising in the administration of the property.

Order

(3) The court may by order give such directions as it considers to be for the benefit of the person and his or her dependants and consistent with this Act.

Variation of order

(4) The court may, on further application by a person referred to in subsection (1) or (2), vary the order.

Compensation

37.-(1) A conservator may take annual compensation from the property in accordance with the prescribed fee scale.

Idem

(2) The compensation may be taken monthly, quarterly or annually.

Idem

(3) If all the persons described in clauses 38(2)(a), (b) and (c) (except the incapable person) consent, the conservator may take compensation on an interim basis or may take an amount of compensation greater than the prescribed fee scale allows.

Annual financial statement

38.-(1) A conservator shall prepare a financial statement as of the 31st day of December in each year, showing,

(a) the assets at the beginning of the year;

(b) the assets at the end of the year;

(c) capital receipts and disbursements;

(d) revenue receipts and disbursements;

(e) the services performed by the conservator; and

(f) the compensation taken, if any.

Notice that statement available

(2) The conservator shall, before the end of February in each year, give written notice that the financial statement for the previous year is available,

(a) to the incapable person, and to his or her guardian or attorney for personal care, if any;

(b) if the conservator is the Public Guardian and Trustee, to the persons who could apply under section 15 to replace the Public Guardian and Trustee as conservator and who have expressed a wish to receive notice;

(c) to the Public Guardian and Trustee, if he or she is not the conservator.

Statement to be given to persons on request

(3) The conservator shall, on request, give a copy of the financial statement to any of the persons referred to in subsection (2).

Particulars

(4) A person who has been given a copy of the financial statement is entitled, on request, to further particulars in respect of it.

Passing of accounts

39.-(1) The court may, on application, order that all or a specified part of the accounts of an attorney or conservator be passed.

Attorney's accounts

(2) An application to pass an attorney's accounts, whether the power of attorney is a continuing power or not, may be made by,

(a) the attorney;

(b) the Public Guardian and Trustee;

(c) the guardian of the grantor of the power of attorney;

(d) the grantor;

(e) a judgment creditor of the grantor;

(f) any other person, with leave of the court.

Conservator's accounts

(3) An application to pass a conservator's accounts may be made by,

(a) the incapable person;

(b) the conservator;

(c) the incapable person's guardian or attorney for personal care, if any;

(d) the Public Guardian and Trustee;

(e) a dependant of the incapable person;

(f) a judgment creditor of the incapable person; or

(g) any other person, with leave of the court.

Filing of accounts

(4) The accounts shall be filed in the court office and the procedure in the passing of the accounts is the same and has the same effect as in the passing of executors' and administrators' accounts in the Surrogate Court.

Powers of court

(5) In an application for the passing of an attorney's accounts the court may, on motion or on its own initiative,

- (a) direct the Public Guardian and Trustee to bring an application for conservatorship;
- (b) suspend the power of attorney pending the determination of the application;
- (c) appoint the Public Guardian and Trustee or another person to act as conservator pending the determination of the application;
- (d) order an examination of the grantor of the power of attorney under section 73 to determine his or her capacity; or
- (e) order that the power of attorney be terminated.

Idem

(6) In an application for the passing of a conservator's accounts the court may, on motion or on its own initiative,

- (a) adjust the conservator's compensation in accordance with the value of the services performed;
- (b) suspend the conservatorship pending the determination of the application;
- (c) appoint the Public Guardian and Trustee or another person to act as conservator pending the determination of the application; or
- (d) order that the conservatorship be terminated.

PART II

THE PERSON

Part applies to persons at least sixteen years old

40.-(1) This Part applies to decisions on behalf of persons who are at least sixteen years old.

Substitute decision-maker must be at least sixteen years old

(2) To exercise a power of decision under this Part on behalf of another person, a person must be at least sixteen years old.

Incapacity for personal care

41. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

POWERS OF ATTORNEY FOR PERSONAL CARE

Power of attorney for personal care

42.-(1) A person may give a written power of attorney for personal care, authorizing the person or persons named as attorneys to make on the grantor's behalf any decisions concerning the grantor's personal care that he or she could make.

Public Guardian and Trustee may be attorney

(2) A power of attorney for personal care may name the Public Guardian and Trustee as attorney.

Conditions, etc.

(3) A power of attorney for personal care is

subject to this Part, and to the conditions that are contained in the power of attorney and are consistent with this Act.

Matters excluded unless expressly stated

(4) Unless it expressly so provides, a power of attorney for personal care does not confer authority for the personal attorney to consent to a non-therapeutic experimental treatment or procedure.

Matters excluded

R.S.O.1980, c.262

(5) No authority to give consent to non-therapeutic sterilization or psychosurgery as defined in section 35 of the Mental Health Act is conferred by a power of attorney for personal care.

Form

(6) A power of attorney for personal care may be in the prescribed form.

Power not effective until validated

(7) A power of attorney for personal care is not effective until it is validated in accordance with section 45 or 46.

Preferred assessors in case of possible incapacity

(8) In a power of attorney for personal care, the grantor may name the persons or describe the classes of persons who may perform an assessment of his or her capacity for personal care if it is in issue.

Designation of preferred guardian

43. A person may, in a power of attorney for personal care, designate the person, including the Public Guardian and Trustee, whom he or she wishes the court to appoint as guardian in the event of his or her incapacity for personal care.

Execution of power of attorney for personal care

44.-(1) A power of attorney for personal care shall be executed in the presence of two witnesses in the manner described in subsection (3).

Persons who shall not be witnesses

(2) The persons described in subsection 9(2) (continuing power of attorney for property, persons who shall not be witnesses) shall not be witnesses.

Formalities of execution by witnesses

(3) Each witness shall sign the document as witness and shall at the same time make a written statement in the prescribed form indicating that, in his or her opinion, at the time of executing the power the grantor was capable of personal care.

Application for validation

45.-(1) The attorney under a power of attorney for personal care may apply to the Public Guardian and Trustee to validate the power of attorney.

Documents to be filed

(2) At the time of making the application, the attorney shall file with the Public Guardian and Trustee copies of the power of attorney and of the statements described in section 47, and a guardianship plan in the prescribed form.

Advocate to visit grantor

(3) An advocate shall promptly visit the grantor and shall,

(a) notify the grantor of the attorney's application and of the statements described in section 47;

(b) explain to the grantor what powers the attorney will have if the power of attorney is validated;

(c) inform the grantor of his or her right to oppose the validation of the power of attorney.

Notice to Public Guardian and Trustee

(4) The advocate shall promptly notify the Public Guardian and Trustee in writing that the visit took place and whether the grantor opposes the validation of the power of attorney.

Certificate

(5) If the grantor does not oppose the validation of the power of attorney, the Public Guardian and Trustee may validate it by issuing a certificate and may in the certificate impose such limits on the attorney's powers as the Public Guardian and Trustee considers appropriate.

Idem

(6) The certificate shall state in respect of which functions described in section 41 (personal care) the grantor is incapable, in the opinion of the makers of the statements described in section 47, and the validation applies only to the powers of the attorney that correspond to those functions.

Refusal to validate power of attorney

(7) If the Public Guardian and Trustee refuses to validate the power of attorney and the attorney disputes the refusal, the Public Guardian and Trustee shall apply to the court to decide the matter.

Court order

(8) The court may make an order validating the power of attorney and may in the order impose such limits on the attorney's powers as it considers appropriate.

Other dispute with Public Guardian and Trustee

(9) If the Public Guardian and Trustee validates the power of attorney but the attorney disputes the

limits imposed on his or her powers or the statement referred to in subsection (6), the Public Guardian and Trustee shall apply to the court to decide the matter.

Court order

(10) The court may amend the certificate as it considers appropriate.

Validation if Public Guardian and Trustee is attorney

46.-(1) If the attorney under a power of attorney for personal care is the Public Guardian and Trustee, this section applies instead of section 45.

Documents to be filed

(2) When the Public Guardian and Trustee wishes to validate the power of attorney, he or she shall file in his or her office copies of the power of attorney and of the statements described in section 47.

Subsections 45(3) and (4) apply

(3) Subsections 45(3) and (4) (advocate to visit grantor, notice to Public Guardian and Trustee) apply with necessary modifications.

Certificate

(4) If the grantor does not oppose the validation of the power of attorney, the Public Guardian and Trustee may validate it by issuing a certificate.

Idem

(5) The certificate shall state in respect of which functions described in section 41 (personal care) the grantor is incapable, in the opinion of the makers of the statements described in section

47, and the validation applies only to the powers of the attorney that correspond to those functions.

Assessment of grantor's capacity

47.-(1) If the attorney under a power of attorney for personal care intends to apply under subsection 45(2) (validation) or if the Public Guardian and Trustee wishes to validate a power of attorney for personal care naming him or her as attorney, the following persons may each perform an assessment of the grantor's capacity:

1. Two of the persons named or described in the power as preferred assessors.
2. If the power does not name or describe preferred assessors, or if there are not two of them who are able and willing to perform an assessment, a physician and a psychiatrist, a second physician, a psychologist or a social worker.

Statement

(2) If a person who performs an assessment concludes that the grantor is incapable in respect of the functions described in section 41 (personal care), or in respect of some of them, he or she shall make a statement, in the prescribed form, and shall give it to the attorney.

Contents of statement

(3) The statement shall indicate that its maker is of the opinion that the grantor is incapable in respect of the functions described in section 41, or in respect of some of them, shall specify the nature and extent of the incapacity and shall set out the facts on which the opinion is based.

Idem

(4) If the maker of the statement is a psychiatrist, a second physician, a psychologist or a social worker, he or she shall certify in the statement that he or she is qualified to perform assessments of capacity.

Termination of power of attorney for personal care

48.-(1) A power of attorney for personal care is terminated,

(a) when the attorney dies, becomes incapable or resigns, if the power does not provide for the substitution of another person or if no such person is able and willing to act;

(b) when the court appoints a guardian under section 54;

(c) when the power is revoked.

Execution of revocation

(2) A revocation shall be in writing and shall be executed in the same way as a power of attorney for personal care.

CONSENT TO PSYCHIATRIC AND MEDICAL TREATMENT

Definitions

49. In this section and sections 50 to 53,

"treatment" means a psychiatric or medical treatment or procedure;

"incapable" means incapable of personal care, as described in section 41, in respect of health care.

Consent on person's behalf

50.-(1) If a treatment which cannot be administered without consent is recommended for a person who is, in the attending physician's opinion, incapable, consent may be given or refused on that person's behalf by a person who is described in one of the following paragraphs and who could consent to treatment on his or her own behalf:

1. A guardian who has authority to consent to treatment on the incapable person's behalf, or an attorney for personal care under a power that confers that authority and has been validated in that respect under section 45 or 46.
2. An attorney for personal care under a power that confers that authority but has not been validated.
3. The incapable person's spouse.
4. The incapable person's child.
5. The incapable person's parent.
6. The incapable person's brother or sister.
7. Any other relative of the incapable person.
8. The incapable person's friend.

Preference

(2) If two or more persons who are described in different paragraphs of subsection (1) claim the authority to give or refuse consent, the claim of the person who is described in the earlier paragraph prevails.

Inquiry by attending physician

(3) The attending physician shall make reasonable inquiry as to the existence of persons described in subsection (1) and shall determine who claims the authority to give or refuse consent.

Where no person is found

(4) If, after a reasonable inquiry, no person described in subsection (1) is found who claims the

authority to give or refuse consent,the Public Guardian and Trustee may give or refuse consent.

Conflict

(5) If two or more persons described in the same paragraph of subsection (1) claim the authority to give or refuse consent and disagree about whether to give or refuse consent, and if their claims would prevail over any other claims, the Public Guardian and Trustee may give or refuse consent.

Medical information

(6) A person who assumes responsibility for giving or refusing consent to treatment on the incapable person's behalf is entitled to receive all the information concerning the incapable person and the proposed treatment that is necessary for an informed consent.

Consent by family member or friend

(7) A person described in paragraph 3, 4, 5, 6, 7 or 8 of subsection (1) shall not give or refuse consent to treatment on the incapable person's behalf unless the person makes a written statement in the prescribed form indicating that he or she,

(a) has been in personal contact with the incapable person during the preceding twelve months and has a friendly relationship with the incapable person;

(b) believes that the incapable person does not object to him or her making the decision;

(c) will act in accordance with subsections 69(1), (3), (4) and (5) (duty of guardian) as if he or she were the incapable person's guardian; and

(d) is satisfied that there is no person described in an earlier paragraph of subsection (1) who claims authority to give or refuse consent to treatment.

Matters excluded

(8) This section does not authorize a person to give consent on an incapable person's behalf to non-therapeutic sterilization, psychosurgery as defined in section 35 of the Mental Health Act, or a non-therapeutic experimental treatment or procedure.

R.S.O.1980, c.262

Visit by advocate

51.-(1) When consent to treatment has been given or refused on an incapable person's behalf by a person described in paragraph 2, 3, 4, 5, 6, 7 or 8 of subsection 50(1), an advocate shall visit the incapable person.

Idem

(2) If consent has been given, the visit shall take place before the treatment is administered.

Duty of advocate

(3) The advocate shall explain to the incapable person,

(a) that the attending physician is of the opinion that the person is incapable;

(b) that another person has claimed authority to give or refuse consent to treatment on the incapable person's behalf;

(c) the decision made by that person;

(d) the person's right to refuse to accept the decision.

Exception

(4) Subsections (1), (2) and (3) do not apply if the reason for the opinion that the person is incapable is that he or she is unconscious, and in

that case, the fact that the person is unconscious shall be noted in the person's medical record.

Incapable person's refusal to accept decision

52.-(1) If a person who is, in the attending physician's opinion, incapable refuses to accept the decision of a person described in paragraph 2, 3, 4, 5, 6, 7 or 8 of subsection 50(1), the decision becomes ineffective.

Second opinion

(2) In that case, the attending physician shall obtain a written opinion from an independent psychiatrist or, if none is available, from an independent physician.

Notice to Public Guardian and Trustee

(3) If the independent psychiatrist or physician agrees that the person is incapable, the attending physician shall immediately inform the Public Guardian and Trustee that the person is incapable and refuses to accept the decision made on his or her behalf.

Application for appointment of guardian

(4) The Public Guardian and Trustee may make an application under section 54 (appointment of guardian) or 64 (temporary guardian in urgent case).

Emergency treatment

53.-(1) If, in the attending physician's opinion, a person is incapable and the delay necessary to obtain consent to treatment on the person's behalf would endanger his or her life, a limb or a vital organ, the attending physician may administer the treatment without consent.

Physician's statement

(2) The attending physician shall promptly note in the person's medical record that he or she is of the opinion that the person is incapable and that the delay necessary to obtain consent would endanger the person's life, a limb or a vital organ.

Second opinion

(3) If the person refuses treatment that the attending physician proposes to administer in accordance with subsection (1), the attending physician shall not administer the treatment without having made all efforts that are reasonable in the circumstances to obtain a written opinion from an independent psychiatrist or, if none is available, from an independent physician.

Idem

(4) If a second opinion is obtained, the attending physician shall not administer the treatment unless the independent psychiatrist or physician agrees that the person is incapable.

Where no second opinion is obtained

(5) If no second opinion is obtained, the attending physician shall promptly note in the person's medical record what efforts were made to obtain one and why they were unsuccessful.

COURT APPOINTMENT OF GUARDIANS

Application for appointment

54.-(1) The court may, on any person's application, appoint a guardian for a person who is incapable of personal care and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.

Standard of proof

(2) The standard of proof that a person is incapable of personal care and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so, is proof beyond a reasonable doubt.

Service of notice

55.-(1) Notice of an application to appoint a guardian shall be served, together with the documents described in subsections 56(1), (2) and (3),

(a) on the person alleged to be incapable of personal care;

(b) on the Public Guardian and Trustee;

(c) on the proposed guardian;

(d) on the following persons, if known:

1. The conservator of the person alleged to be incapable.
2. The person's attorney for personal care.
3. The attorney under the person's continuing power of attorney for property.
4. The preferred guardian designated by the person under section 43.

Idem

(2) The notice and accompanying documents need not be served on the applicant.

Service on family and friends by mail

(3) The notice and accompanying documents shall also be served on at least two of the following

persons, by ordinary mail sent to their last known address, in accordance with subsection (4):

1. The spouse of the person alleged to be incapable, and the person's children who are at least sixteen years old.
2. The person's parents.
3. The person's brothers and sisters who are at least sixteen years old.
4. The person's friends who are at least sixteen years old and have been in personal contact with him or her during the preceding twelve months.

Idem

(4) All the persons described in paragraph 1 of subsection (3) who are known shall be served, and if fewer than two persons described in that paragraph are served, all the persons described in the next paragraph who are known shall be served, and so on until at least two persons have been served.

Parties

(5) The parties to the application are the applicant and the persons served under clauses (1)(a), (b), (c) and (d).

Idem

(6) A person described in clause (1)(d) who has not been served, or a person described in subsection (3), whether served or not, is entitled to be added as a party at any stage in the proceeding if he or she serves a notice of appearance on every person who was served under subsection (1) and files it with proof of service.

Notice and accompanying documents to be given to advocate

(7) For the purposes of subsection 56(7), the applicant shall ensure that an advocate receives a copy of the notice of application and of the accompanying documents when they are served on the parties.

Accompanying documents

56.-(1) An application to appoint a guardian shall be accompanied by,

(a) the proposed guardian's consent;

(b) a guardianship plan, in the prescribed form; and

(c) if the proposed guardian is not the Public Guardian and Trustee, one of the following:

1. The Public Guardian and Trustee's certificate that he or she has examined and approved the guardianship plan, has assessed the proposed guardian and does not object to the appointment.
2. The Public Guardian and Trustee's reasons for not giving the certificate.

Statements of witnesses

(2) The application may also be accompanied by one or more statements, each made in the prescribed form by a person who knows the person alleged to be incapable and has been in personal contact with him or her during the twelve months preceding the notice of application.

Professional assessment

(3) If the applicant wishes the application to be dealt with under section 57 (summary disposition), the application shall also be accompanied by two statements made in the

prescribed form, one by a physician and the other by a psychiatrist, a second physician, a psychologist or a social worker.

Contents of statement

(4) Each statement shall indicate that its maker is of the opinion that the person is incapable in respect of the functions described in section 41 (personal care), or in respect of some of them, and shall set out the facts on which the opinion is based.

Idem

(5) The statement may also indicate that its maker is of the opinion that the person needs decisions to be made on his or her behalf by a person who is authorized to do so and, in that case, shall set out the facts on which the opinion is based.

Idem

(6) Each statement referred to in subsection (3) shall,

(a) indicate that its maker performed an assessment of the person's capacity during the six months preceding the notice of application;

(b) contain an evaluation of the nature and extent of the person's incapacity, setting out the facts on which the evaluation is based;

(c) in the case of a statement by a psychiatrist, second physician, psychologist or social worker, indicate that its maker is qualified to perform assessments of capacity.

Advocate to visit person

(7) An advocate shall visit the person alleged to be incapable of personal care and explain to him or her the significance of the notice of

application and accompanying documents and the right to oppose the application.

Statement of advocate to be filed

(8) The applicant shall file the advocate's statement, in the prescribed form, indicating that the advocate has complied with subsection (7), or that he or she was prevented from visiting the person despite attempts to do so.

Idem

(9) If the advocate was prevented from visiting the person, the statement shall contain a detailed explanation.

Summary disposition

57.-(1) The registrar of the court shall submit the notice of application and accompanying documents to a judge of the court if the following conditions are satisfied:

1. No person has delivered a notice of appearance.
2. The statements referred to in subsection 56(3) (professional assessment) accompany the application.
3. At least one of the statements referred to in subsection 56(2) or (3) indicates that its maker is of the opinion that the person needs decisions to be made on his or her behalf by a person who is authorized to do so.

Order

(2) On hearing the application, the judge may,

(a) grant the relief sought;

(b) adjourn the application and require the parties or their counsel to adduce additional evidence or make representations; or

(c) order that the application, or any issue, proceed to trial, and give such directions as are just.

Who may not be appointed guardian

58.-(1) A person who provides residential, social, health care, training or support services to an incapable person for compensation shall not be appointed his or her guardian.

Exception

(2) Subsection (1) does not apply to members of the incapable person's family or to the following persons:

1. The conservator.
2. The attorney for personal care.
3. The attorney under a continuing power of attorney for property.
4. The preferred guardian designated under section 43.

Criteria

(3) Except in the case of an application that is being dealt with under section 57 (summary disposition), the court shall consider,

(a) whether the proposed guardian is the attorney under a continuing power of attorney for property or has been designated as preferred guardian under section 43;

(b) the incapable person's wishes, if known; and

(c) the closeness of the applicant's personal relationship to the incapable person.

Two or more guardians

(4) The court may, with their consent, appoint two or more persons as joint guardians or may appoint each of them as guardian in respect of a specified period.

Order to include finding of incapacity, etc.

59.-(1) An order appointing a guardian for a person shall include a finding that the person is incapable in respect of the functions described in section 41, or in respect of some of them, and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.

Contents of order

(2) An order appointing a guardian may,

(a) make the appointment for a limited term as the court considers appropriate;

(b) impose such conditions on the appointment as the court considers appropriate.

Full or partial guardianship

(3) The order shall specify whether the guardianship is full or partial.

Full guardianship

60.-(1) The court may make an order for full guardianship if the court finds that the person is incapable in respect of all the functions described in section 41.

Powers of guardian under order for full guardianship

(2) Under an order for full guardianship, the guardian may,

(a) exercise custodial power over the person under guardianship and determine his or her living arrangements;

(b) be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers;

(c) settle claims and commence and settle proceedings on the person's behalf, except claims and proceedings that relate to the person's property or to the guardian's status or powers;

(d) have access to personal information to which the person could have access if capable, and consent to the release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status or powers;

(e) give or refuse consent on the person's behalf to,

  (i) medical or psychiatric treatment,

  (ii) psychological treatment,

  (iii) other health services and social services;

(f) make decisions about the person's employment, education, training and recreation;

(g) exercise the other powers and perform the other duties that are specified in the order.

Power to apprehend person

(3) If the guardian has custodial power over the person and the court is satisfied that it may be necessary to apprehend him or her, the court may in its order authorize the guardian to do so.

Idem

(4) In that case the guardian may, with the assistance of a police officer, enter the premises specified in the order (between 9 a.m. and 4 p.m. or during the hours specified in the order) and search for and remove the person, using such force as may be necessary.

Exceptions

(5) Unless the order expressly provides otherwise, the guardian does not have power,

R.S.O.1980, c.262

(a) to consent on the person's behalf to his or her admission to a psychiatric facility as defined in the Mental Health Act;

(b) to restrain or confine the person, or to give consent on his or her behalf to restraint or confinement;

(c) to change existing arrangements in respect of custody of or access to a child, or to give consent on the person's behalf to the adoption of a child;

(d) to give consent on the person's behalf to,

(i) restraint, confinement or the application of electric shock for the purpose of aversive conditioning,

(ii) any non-therapeutic medical, psychiatric, psychological or other health treatment or procedure.

Experiments

(6) The guardian does not have power to give consent on the person's behalf to his or her involvement in a research project or experiment, unless the order confers that power and specifically identifies the project or experiment.

Idem

(7) The court shall not make an order conferring the power referred to in subsection (6) unless the court is satisfied that the following conditions are met:

1. The project or experiment is conducted under the auspices of a university or hospital whose research ethics committee has approved it.
2. The benefits to the person that will result from involvement in the project or experiment outweigh any risks.
3. The project or experiment will not demean the person's dignity.

Exception

(8) Subsection (6) does not apply to research

projects or experiments that consist only of the compilation or analysis of information.

Matters excluded

(9) No power to give consent on an incapable person's behalf to non-therapeutic sterilization or psychosurgery as defined in section 35 of the Mental Health Act is conferred on a guardian by this Act or by an order made under this Act.

R.S.O.1980, c.262

Restraint or confinement to prevent serious bodily harm

61.-(1) Clause 60(5)(b) does not affect the common law duty of care givers to restrain or confine persons, in emergencies, as may be necessary to prevent serious bodily harm to them or to others.

Report

(2) Each time a caregiver restrains or confines a person whom the caregiver believes to be incapable, he or she shall notify the following persons:

1. The Public Guardian and Trustee, unless the person has a guardian with the power referred to in clause 60(5)(b).
2. The person's guardian, if any.
3. The attorney for personal care, if any, under a power that has been validated under section 45 or 46.

Restriction on guardian's power to restrain or confine person

(3) A guardian who has the power referred to in clause 60(5)(b) shall exercise it only as may be necessary to prevent bodily harm to the person or to others.

Partial guardianship

62.-(1) The court may make an order for partial guardianship if it finds that the person is incapable in respect of some but not all of the functions described in section 41.

Idem

(2) The order shall specify in respect of which functions the person is found to be incapable.

Powers of guardian under order for partial guardianship

(3) Under an order for partial guardianship, the guardian may exercise those of the powers set out in subsection 60(2) that are specified in the order, but only in respect of the functions in respect of which the person is found to be incapable.

Variation

63.-(1) The court may, on any person's application, vary an order appointing a guardian or substitute another person as guardian.

Notice, etc.

(2) Section 55 (service of notice, parties) and subsections 56(7), (8) and (9) (visit by advocate) apply to the application, with necessary modifications.

Standard of proof

(3) In establishing the facts necessary to support the application, the standard of proof is proof on the balance of probabilities, unless the application seeks to increase the guardian's powers, in which case the standard is proof beyond a reasonable doubt.

Serious adverse effects

64.-(1) Serious illness or injury, or deprivation of liberty or personal security, are serious adverse effects for the purposes of this section.

Temporary guardian in urgent case

(2) If, in the opinion of the Public Guardian and Trustee, a person is incapable of personal care and prompt action is required to protect the person from serious adverse effects, the Public Guardian and Trustee shall apply to the court for an order appointing him or her as temporary guardian.

Notice

(3) Notice of the application shall be served on the person alleged to be incapable, unless the court dispenses with notice in view of the nature and urgency of the matter.

Standard of proof

(4) For the purpose of an application to appoint a temporary guardian, the standard of proof that the person is incapable of personal care and that the person, as a result, is suffering or is likely to suffer serious adverse effects is proof on the balance of probabilities.

Order appointing temporary guardian

(5) The court may by order appoint the Public Guardian and Trustee as temporary guardian.

Duration of appointment

(6) The appointment is valid for a period not exceeding ninety days if notice was served on the person and not exceeding seven days if notice was dispensed with.

Contents of order

(7) The order shall set out the Public Guardian and Trustee's powers as temporary guardian and any conditions imposed on the guardianship.

Power to apprehend person

(8) If the Public Guardian and Trustee has custodial power over the person and the court is

satisfied that it may be necessary to apprehend him or her, the court may authorize the Public Guardian and Trustee to do so.

Idem

(9) In that case the Public Guardian and Trustee may, with the assistance of a police officer, enter the premises specified in the order (between 9 a.m. and 4 p.m. or during the hours specified in the order) and search for and remove the person, using such force as may be necessary.

Termination, variation of term

(10) On the application of the Public Guardian and Trustee or of the person under guardianship, the court may terminate the guardianship or reduce or extend its term.

Suspension of temporary guardian's powers

(11) An application by the person under guardianship to terminate the guardianship suspends the temporary guardian's powers, unless the court orders otherwise.

Application for termination

65.-(1) The court may, on any person's application, terminate a guardianship ordered under section 54.

Standard of proof

(2) The standard of proof that the person under guardianship is capable of personal care is proof on the balance of probabilities.

Suspension of guardian's powers

(3) An application by the person under guardianship to terminate the guardianship suspends the guardian's powers, unless the court orders otherwise.

Service of notice

66.-(1) Notice of an application to terminate a guardianship shall be served, together with the documents described in subsection 67(1),

(a) on the person under guardianship;

(b) on the guardian;

(c) on the Public Guardian and Trustee;

(d) on the person's conservator or attorney for personal care, if known.

Idem

(2) The notice and accompanying documents need not be served on the applicant.

Service on family and friends by mail

(3) The notice and documents shall also be served on at least two of the following persons, by ordinary mail sent to their last known address, in accordance with subsection (4):

1. The spouse of the person under guardianship and the person's children who are at least sixteen years old.
2. The person's parents.
3. The person's brothers and sisters who are at least sixteen years old.
4. The person's friends who are at least sixteen years old and have been in personal contact with him or her during the preceding twelve months.

Idem

(4) All the persons described in paragraph 1 of subsection (3) who are known shall be served, and if fewer than two persons described in that paragraph are served, all the persons described in the next paragraph who are known shall be served, and so on until at least two persons have been served.

Parties

(5) The parties to the application are the applicant and the persons served under clauses (1)(a), (b), (c) and (d).

Idem

(6) A person described in clause (1)(d) who has not been served, or a person described in subsection (3), whether served or not, is entitled to be added as a party at any stage in the proceeding if he or she serves a notice of appearance on every person who was served under subsection (1) and files it with proof of service.

Notice and accompanying documents to be given to advocate

(7) For the purposes of subsection 67(5), the applicant (except where he or she is the person under guardianship) shall ensure that an advocate receives a copy of the notice of application and of the documents described in subsections 67(1) and (2) when they are served on the parties.

Statements of witnesses

67.-(1) An application to terminate a guardianship may be accompanied by one or more statements, each made in the prescribed form by a person who knows the person under guardianship and has been in personal contact with him or her during the twelve months preceding the notice of application.

Professional assessment

(2) If the applicant wishes the application to be dealt with under section 68 (summary disposition), the application shall also be accompanied by two statements made in the

prescribed form, one by a physician and the other by a psychiatrist, a second physician, a psychologist or a social worker.

Contents of statements

(3) Each statement shall indicate that its maker is of the opinion that the person is capable of personal care, and shall set out the facts on which the opinion is based.

Idem

(4) Each statement referred to in subsection (2) shall indicate that its maker performed an assessment of the person's capacity during the six months preceding the notice of application and, in the case of a statement by a psychiatrist, second physician, psychologist or social worker, shall indicate that its maker is qualified to perform assessments of capacity.

Advocate to visit person

(5) Except where the person under guardianship is the applicant, an advocate shall visit the person and explain to him or her the significance of the notice of application and accompanying documents and the right to oppose the application.

Statement of advocate to be filed

(6) The applicant shall file the advocate's statement, in the prescribed form, indicating that the advocate has complied with subsection (5) or that he or she was prevented from visiting the person despite attempts to do so.

Idem

(7) If the advocate was prevented from visiting the person, the statement shall also contain a detailed explanation.

Summary disposition

68.-(1) The registrar of the court shall submit the notice of application and accompanying documents to a judge of the court if the following conditions are satisfied:

1. No person has delivered a notice of appearance.
2. The statements referred to in subsection 67(2) (professional assessment) accompany the application.

Order

(2) On hearing the application, the judge may,

(a) grant the relief sought;

(b) adjourn the application and require the parties or their counsel to adduce additional evidence or make representations; or

(c) order that the application, or any issue, proceed to trial, and give such directions as are just.

DUTIES OF GUARDIANS AND PERSONAL ATTORNEYS

Duty of guardian

69.-(1) A guardian shall exercise his or her powers and perform his or her duties diligently and in good faith, and shall act for the incapable person's benefit.

Explanation

(2) The guardian shall explain to the incapable person what the guardian's powers are and that he or she will act for the person's benefit.

Decisions on incapable person's behalf

(3) The guardian shall make decisions on the incapable person's behalf in accordance with the intentions the person had before becoming incapable, and shall take into consideration the

incapable person's wishes, if those intentions and wishes can be ascertained.

Idem

(4) If no intentions and wishes can be ascertained, the guardian shall make decisions on the incapable person's behalf that are likely to promote the person's well-being.

Idem

(5) The guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions on his or her behalf.

Idem

(6) The guardian shall, as far as possible, seek to foster the incapable person's self-reliance and independence.

Guardianship plan

(7) A guardian other than the Public Guardian and Trustee shall act in accordance with the guardianship plan.

Amendment of plan

(8) The guardianship plan may be amended from time to time with the Public Guardian and Trustee's approval.

Application for directions

(9) The guardian may apply to the court for directions on any question arising in the guardianship.

Idem

(10) The incapable person or his or her dependant, the conservator, the attorney under a continuing power of attorney, or any other person with leave of the court, may also apply to the court for directions to the guardian on any question arising in the guardianship.

Immunity

(11) No proceeding for damages shall be commenced against a guardian for anything done or omitted in good faith in connection with his or her powers and duties under this Act.

Annual report

70.-(1) A guardian shall prepare a report in the prescribed form as of the 31st day of December in each year and shall file it with the Public Guardian and Trustee before the end of February in the following year.

Idem

(2) The report shall indicate,

(a) where the incapable person resides;

(b) what decisions concerning the person's health care and safety were made on his or her behalf during the year;

(c) whether the person objected to any decisions made on his or her behalf during the year and, if so, what those decisions were;

(d) any proposals by the guardian for changes in the guardianship plan;

(e) whether an advocate has visited the person during the year.

Change of person's residence

71.-(1) A guardian shall promptly notify the Public Guardian and Trustee of any change in the incapable person's place of residence.

Change to more restrictive setting

(2) The guardian shall not change the person's place of residence to a more restrictive setting unless,

(a) the Public Guardian and Trustee, and the person's conservator or the person's attorney under a continuing power of attorney, if any, consent to the change; or

(b) the court, on the guardian's application, permits him or her to make the change.

Attorney for personal care

72.-(1) Sections 69, 70 and 71 also apply, with necessary modifications, to an attorney under a power of attorney for personal care that has been validated under section 45 or 46.

Person who consents to treatment on incapable person's behalf

(2) Subsections 69(1), (3), (4), (5) and (11) also apply, with necessary modifications, to a person who makes a decision on an incapable person's behalf in accordance with section 50 (consent to treatment).

PART III

MISCELLANEOUS

Order for examination

73.-(1) If a person's capacity is in issue in a proceeding under this Act and the court is satisfied that there are reasonable grounds to believe that the person is incapable, the court may, on motion or on its own initiative, order that the person be examined by a psychiatrist, physician, psychologist or social worker named in the order, or by more than one such person, for the purpose of giving an opinion as to the person's capacity.

Idem

(2) The order may require the person,

(a) to submit to the examination;

(b) to permit entry to his or her residence for the purposes of the examination;

(c) to attend at such other places and at such times as are specified in the order.

Examination to be conducted in person's home if possible

(3) An examination under this section shall, if possible, be conducted in the person's home.

Order for enforcement

(4) When an order has been made under subsection (1) the court may, on motion, order the Public Guardian and Trustee, together with a police officer, to apprehend the person whose capacity is in issue and take him or her into custody, if the court is satisfied that,

(a) the examiner named in the first order has made all efforts that are reasonable in the circumstances to visit the person in order to conduct the examination;

(b) the examiner was prevented from visiting the person by the actions of the person or of others; and

(c) the examination can not be conducted by means of a course of action that is less intrusive than an order under this subsection.

Statement of advocate

(5) The motion shall be accompanied by,

(a) an advocate's written statement that he or she has visited the person and has explained the order for examination;

(b) if the advocate has been prevented from visiting the person to explain the order, the advocate's written statement that he or she made efforts to do so, with an explanation why the efforts were unsuccessful.

Duration of order

(6) The order is valid for seven days.

Execution of order

(7) The Public Guardian and Trustee and the police officer may enter the premises specified in the order (between 9 a.m. and 4 p.m. or during the hours specified in the order) and may search for and remove the person, using such force as may be necessary.

Restrictions

(8) The person shall not be held in custody longer than is necessary for the purposes of the examination, and in any case not for a period exceeding seventy-two hours, and while in custody shall not be confined in a manner that exceeds what is necessary for the purposes of the examination.

Public hospital

R.S.O.1980, c.410

(9) An order made under subsection (1) or (4) authorizes a hospital as defined in the Public Hospitals Act to admit the person and to facilitate the examination.

Statements as evidence

74. For the purposes of this Act, a statement in the prescribed form that purports to be signed by its maker is admissible in evidence without proof of his or her signature, office or professional qualifications.

Mediation

75. If a dispute arises between a person's guardian or attorney for personal care and his or her conservator or attorney under a continuing power of attorney, in the performance of their duties, the Public Guardian and Trustee shall mediate between them and seek to resolve the dispute.

Offence: obstruction

76.-(1) No person shall hinder or obstruct,

(a) a person who is conducting an examination ordered under section 73, or is seeking to do so;

(b) an advocate who is visiting a person in accordance with this Act, or is seeking to do so.

Penalty

(2) A person who contravenes subsection (1) is guilty of an offence and is liable, on conviction, to a fine not exceeding $5,000.

Exception

(3) Subsection (1) does not apply to the person who is the subject of the order for examination or whom the advocate is visiting or seeking to visit.

Offence: untrue assertions of fact or opinion

(4) No person shall, in a statement made in a prescribed form, assert something that he or she knows to be untrue or profess an opinion that he or she does not hold.

Penalty

(5) A person who contravenes subsection (4) is guilty of an offence and is liable, on conviction, to a fine not exceeding $10,000.

Regulations

77. The Lieutenant Governor in Council may make regulations,

(a) prescribing classes of persons for the purposes of the definition of "advocate";

(b) prescribing forms;

(c) prescribing a fee scale for conservators' compensation, including annual percentage charges on revenue and on capital.

Commencement

78. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

79. The short title of this Act is the Substitute Decisions Act, 1987.